Supreme Court, U.S.
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011440 MAR 27 2002

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No. _____

In The

Supreme Court of the United States

BENJAMIN K. ORIN,

Petitioner,

v.

RICHARD BARCLAY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED FOR REVIEW

Under the Free Speech Clause of the First Amendment, can police officers arrest a speaker in a public forum on a public college campus due to the audience's hostile reaction to the speaker? In particular:

a. Can the officers arrest the speaker without making an effort to control or disperse the hostile audience?

b. Is the arrest a content-neutral regulation of speech?

c. Must the officers' determination of probable cause under the Fourth Amendment necessarily entail a determination of whether the Free Speech Clause protects the allegedly wrongful conduct?

PARTIES TO THE PROCEEDING

Benjamin K. Orin was the plaintiff in the district court and the appellant in the court of appeals. The defendants-appellees were Richard Barclay, and his marital community, in his individual and official capacity; Robert Wallace, and his marital community, in his individual capacity; Alan Hornberg, and his marital community, in his individual capacity; Rick McCluskey, and his marital community, in his individual capacity; and the City of Bremerton, a municipal corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Benjamin Orin petitions for a writ of certiorari to review the decision of the court of appeals in this case.

OPINIONS AND ORDERS BELOW

The opinion and judgment of the district court are unpublished and appear in the Appendix to this petition at App. 23-43. The opinion of the court of appeals is reported at 272 F.3d 1207 (9th Cir. 2001) and appears at App. 1-22. The order of the court of appeals denying petitions for rehearing en banc is unpublished and appears at App. 44-45.

STATEMENT OF JURISDICTION

The court of appeals filed its opinion on November 9, 2001. App. 1. It denied a timely petition for rehearing en banc on December 27, 2001. App. 44. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2001).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case arises under the Free Speech Clause, U.S. Const., amend. I, and 42 U.S.C. §§ 1983 and 1985(3) (2001). The Free Speech Clause states: "Congress shall make no law . . . abridging the freedom of speech. . . . "

Sections 1983 and 1985(3) are reproduced in the Appendix at App. 46-47. The case also involves the Fourth Amendment, U.S. Const., amend. IV, which states, in relevant part: "no warrants shall issue, but upon probable cause, supported by oath or affirmation. . . . " In addition, the case involves Wash. Rev. Code §§ 9A.52.070, 9A.52.080, 9A.52.090, and 9A.84.020 (2001), which are reproduced at App. 47-49.

STATEMENT OF THE CASE

A. The Incident.

In October 1997, Petitioner Benjamin Orin and two friends expressed their views against abortion on the campus of Olympic College, a public college in Bremerton, Washington. App. 2-3. Respondents Richard Barclay, dean of the college, and Robert Wallace, the college's security chief, allowed Orin and his friends to demonstrate on campus on the condition that they were peaceful, did not interfere with the educational process, and did not engage in religious education or worship. App. 35.

Orin and his friends went to an area near the student center and spoke with passersby and held signs. One sign showed a live baby and said, "Life." Other signs showed aborted babies and said, "Abortion." A crowd gathered around the demonstrators; its size waxed and waned during the afternoon. Several in the crowd carried their own signs and many shouted. According to security chief Wallace, some in the crowd yelled at Orin and his friends, "[W]e are going to kick your ass." Excerpts of Record

("R.") 54.[1] According to another security officer, some in the crowd jibed, "[G]et the f___ off campus!" R. 38.

There is no allegation that Orin acted violently. R., *passim*. Some crowd members alleged that the demonstrators used racial or sexist epithets, which the demonstrators denied. App. 27. There also was an allegation that one of the other two demonstrators, Jim McIntyre, swung at a campus security officer, App. 5 n.2, an allegation McIntyre denied. *Id.*; R. 137. Even so, neither the district court nor the court of appeals rested its holding on these allegations.

After 4:00 p.m., dean Barclay came to the student center area and, in Barclay's words, asked Orin to "cool the religious statement he was making." R. 34. A short time later, security chief Wallace called the Bremerton Police Department. When asked why he called the police, Wallace said the demonstrators were violating dean Barclay's guidelines, specifically: "Well, I would guess the No. 1 was the exercising the religious [sic], up on the table, screaming; and No. 2 was creating the riotous situation." R. 125.

Respondent Alan Hornberg, a Bremerton police officer, arrived at the scene. According to officer Hornberg, he was dispatched to the college to respond to "a reported group of protestors that were refusing to leave and a large unruly crowd that was getting out of hand." R. 41 (quoted at App. 4). Officer Hornberg also said that the college's security guard told him that "the student

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[1] This refers to Orin's Excerpts of Record filed in the court of appeals.

crowd was agitated to the point of physical violence against the protestors" and "the security staff didn't feel that they had the manpower to protect the anti-abortion protestors from the students." *Id.* (quoted at App. 5). Officer Hornberg saw members of the crowd threaten to injure Orin and his friends. *Id.* After Hornberg arrived, another police officer, Susan Shultz, arrived. R. 48-50.

Within minutes of arriving, Hornberg arrested Orin for criminal trespass, Wash. Rev. Code § 9A.52.080(1), and failure to disperse, Wash. Rev. Code § 9A.84.020(1). The crowd cheered as Orin was arrested. R. 39, 56. Respondent Richard McCluskey, the Bremerton "officer in charge of the shift" that day, arrived and told Hornberg to take Orin to jail. R. 47. Orin spent the night in jail but was released the next day and was never charged. R. 130. No one else was arrested.

B. The District Court Decision.

Orin sued dean Barclay, security chief Wallace, officers Hornberg and McCluskey, and the City of Bremerton. Orin asserted claims for deprivation of constitutional rights, under 42 U.S.C. §§ 1983 and 1985(3). Specifically, he alleged false arrest and violations of the Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Orin also asserted state constitutional violations and state torts. He sought damages from all defendants and an injunction prohibiting dean Barclay from banning religious speech in public fora on the Olympic College campus.

The district court granted summary judgment to the four individual defendants, relying primarily on their claims of qualified immunity. The district court dismissed all claims against all defendants. Jurisdiction in the district court was proper under 28 U.S.C. §§ 1331, 1343(a), and 1367(a) (2001).

C. The Court of Appeals Decision.

On review, a panel of the Ninth Circuit held that the college officials' first two conditions – no public disturbance and no interference with campus activities – survived First Amendment scrutiny because they were content-neutral regulations narrowly tailored to achieve a legitimate government interest – the college's "pedagogical purpose." App. 9. The panel held that the college officials' third condition – to refrain from religious worship or instruction – was a content-based regulation that must serve a compelling state interest and be narrowly drawn to achieve that interest. App. 10. The panel said, "having permitted Orin to conduct a demonstration on campus, Barclay could not, consistent with the First Amendment's free speech and free exercise clauses, limit his demonstration to secular content." App. 10. The panel reversed the district court's holding that Barclay and Wallace have qualified immunity against Orin's First Amendment claims and remanded for trial.

The panel did not address whether Orin's arrest was a permissible regulation of speech under the First Amendment. The majority stated: "The record confirms that Hornberg could reasonably have believed that he was not violating Orin's First Amendment rights because

he had probable cause to arrest Orin for violating Washington's laws pertaining to trespass and failure to disperse," and "We affirm the district court's decision that, because police officers Hornberg and McCluskey had probable cause to act against Orin under the Fourth Amendment, they did not violate his First Amendment rights." App. 13. Thus, the panel affirmed summary judgment for officers Hornberg and McCluskey based on qualified immunity. The panel affirmed summary judgment for the City because the court found that the officers did not violate Orin's First Amendment rights. App. 14.

Judge Boochever concurred in the result but declined to join the majority opinion "to the extent it concludes that the hostile reaction of an audience to a speaker creates probable cause to arrest that speaker." App. 21. He stated, "The majority cites no authority, and I am aware of none, that indicates the hostile reaction of an audience to a speaker creates probable cause to arrest that speaker." App. 19.

The panel treated Orin's Equal Protection claim "as subsumed by, and co-extensive with, his First Amendment claim." App. 6 n.3. Orin did not pursue his Free Exercise claim on appeal. The panel affirmed the district court's dismissal of Orin's state law tort claims and did not address Orin's state constitutional claims.

REASONS FOR GRANTING THE WRIT

In the decision below, the Ninth Circuit stated that "Orin was amidst an angry crowd of forty to fifty people. A prudent man observing the scene could easily have

believed that *the crowd created a substantial risk* of injury or property damage." App. 16-17 (emphasis added). In his concurrence, Judge Boochever wrote that "no prudent person would have thought Orin was doing anything illegal. To the contrary, the record suggests that Orin was arrested because the police and campus security were afraid that *observers of the protest* were getting violent and would harm the protestors." App. 19 (emphasis in original). Officer Hornberg said that it was the "large unruly crowd that was getting out of hand," and that the crowd was threatening "physical violence against the protestors." App. 4, 5; R. 41.

According to the Ninth Circuit's decision, Orin was arrested because his audience did not like Orin's message and became hostile. The Ninth Circuit found that such an arrest passes First Amendment scrutiny because the police had probable cause to arrest for criminal trespass and failure to disperse. The Ninth Circuit's decision conflicts with several decisions of this Court and the circuit courts.

A. The Decision Below Conflicts with Decisions Regarding Hostile Audiences.

1. Conflict with circuit courts regarding the arrest of a speaker due to a hostile audience.

a. The circuits' positions.

In *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), Justice Roberts referred to a public official's "duty to maintain order in connection with the exercise of the right" to free expression. 307 U.S. at 516 (Opinion by Roberts, J.; Black, J., concurring; Hughes,

C.J., Stone, J., and Reed, J., concurring in judgment). Twelve years later, Justice Frankfurter cited *Hague* and agreed that such a duty exists but stated:

> Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity. Here, there were two police officers present for 20 minutes. They interfered only when they apprehended imminence of violence. It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker.

Niemotko v. Maryland, 340 U.S. 268, 289 (1951) (Frankfurter, J., concurring in result).

Since Justice Frankfurter's statement, the lower courts have struggled with adjudicating the responsibility of police officers when the officers must mediate between a speaker and a hostile audience. The results among the circuits have varied:

> *Fifth Circuit*: Those claiming the rights to picket, march, and assemble "are entitled to police protection throughout the course thereof." *Kelly v. Page*, 335 F.2d 114 (5th Cir. 1964). "The state is not powerless to prevent imminent violence or lawlessness resulting from a clash between the marchers and onlookers. If this situation arises, the police must try first to disperse and control the crowd, and if that becomes impossible, the marchers may be arrested." *Beckerman v. Tupelo*, 664 F.2d 502, 510

(5th Cir. 1981) (citing *Feiner v. New York*, 340 U.S. 315, 326-27 (Black, J., dissenting)).

Sixth Circuit: "A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights." *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir.) (citations omitted), *cert. denied*, 423 U.S. 930 (1975). "And, in the absence of a speaker's exhortation to violence, in carefully defined circumstances, state officials are not entitled to rely on community hostility as an excuse not to protect, by inaction or affirmative conduct, the exercise of fundamental rights." *Id.* (quotation marks, citations, and footnote omitted).

> Yet, the law does not expect or require [officers] to defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury. In such circumstances, they may discharge their duty of preserving the peace by intercepting his message or by removing the speaker for his own protection without having to respond in damages.

Id.

Eleventh Circuit: To protect demonstrators "from an increasingly threatening crowd," police officers

> could have taken steps to protect appellants while allowing the demonstration to continue, such as surrounding the speakers or

> arresting those spectators who threatened violence. Or they could have taken Party members [appellants] into temporary protective custody, curtailing the demonstration but not subjecting appellants to prosecution. Instead, after attempting only voluntary appeals, police arrested appellants and charged them under a statute intended for a different purpose.

Sabel v. Stynchcombe, 746 F.2d 728, 731 (11th Cir.), *reh'g denied*, 751 F.2d 394 (1984).[2]

b. The decision below.

There is nothing in the record of this case, or in the opinions of the courts below, to suggest that the police officers made any effort to disperse the hostile crowd that

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[2] *See also Wolin v. Port of New York Auth.*, 392 F.2d 83, 94 (2d Cir.) ("In the exercise of his rights under fair and reasonable regulations," speaker is "entitled to protection" by police; public officials have "constitutional responsibility to protect those properly exercising their rights of expression") (footnote and citations omitted), *cert. denied*, 393 U.S. 940 (1968), *abrogation on other grounds recognized, International Society for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 579 n.3 (2d Cir. 1991); *Downie v. Powers*, 193 F.2d 760, 764 (10th Cir. 1951) ("when the rioters gathered at the place of the public meeting it became [police chief's] statutory duty to go among them, or as near to them as possible, and command them in the name of the State, to immediately disperse"); *Sellers v. Johnson*, 163 F.2d 877, 883 (8th Cir. 1947) ("the Jehovah's witnesses are entitled to be protected in the exercise of their constitutional rights of freedom of assembly, speech and worship").

gathered in opposition to Orin's message. *See* App., *passim*; R., *passim*. Officer Hornberg's narrative report, written the day of the incident, does not mention any effort by him or the other officers to disperse, or even caution, the hostile audience. R. 43-45. Instead, Hornberg arrived at the scene, told Orin he had to leave, and arrested Orin when he declined. App. 5; R. 43. No one other than Orin was arrested. Moreover, Orin's arrest and night in jail suggest that he was not arrested for his own safety.

c. Can police arrest a speaker due to the audience's hostile reaction?

The decision here approves of officer Hornberg's arrest of Orin although Hornberg took no action against the hostile audience before the arrest. App. 4-5; R. 43. The decision conflicts with decisions of the Fifth, Sixth, and Eleventh Circuits. These circuits have held that police may not simply arrest the speaker whenever an audience turns hostile.

In *Beckerman*, an anti-racism group sought injunctive relief against the enforcement of parade and sound equipment ordinances. 664 F.2d 502, 506 (5th Cir. 1981). The parade ordinance allowed the police chief to deny a permit if he found that the parade was likely "to provoke disorderly conduct." *Id.* at 507. The Fifth Circuit held that this provision was an impermissible prior restraint on free speech because it allowed a "heckler's veto" of the speech. *Id.* at 509. When marchers and onlookers clash, "the police must try first to disperse and control the crowd." *Id.* at 510. "If that becomes impossible, the marchers may be arrested." *Id.* (citation omitted).

In *Glasson*, a police officer destroyed the poster of a woman who stood on a sidewalk waiting for President Nixon's motorcade to pass by. 518 F.2d 899, 901 (6th Cir. 1975). The woman sued under 42 U.S.C. §§ 1983 and 1985(3). 518 F.2d at 901. The officer sought to defend his action, in part, on the basis that the plaintiff's poster "evoked a hostile reaction from others." *Id.* at 905. The Sixth Circuit held that the officer's action violated the First Amendment and that an officer "must take reasonable action to protect from violence persons exercising their constitutional rights." *Id.* at 906 (citations omitted).[3] But the officer need not "defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury." *Id.* at 909. At that point, officers "may discharge their duty of preserving the peace by intercepting [the speaker's] message or by removing the speaker for his own protection. . . . " *Id.*

In *Sabel*, members of a pro-Communist group were convicted under a refusal to disperse statute. 746 F.2d 728, 729 (11th Cir. 1984). Six group members gathered at an apartment complex where they spoke through a bullhorn and distributed literature and red flags. *Id.* Eventually, a crowd of 200 residents was shouting, shoving, and cursing in response to the Communists. *Id.* at 730. When two police officers arrived, they found an angry crowd

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[3] *See also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 375 (D.C. Cir. 1992) (government restriction on march based on threat of violence not constitutional where district court found that "threat of violence was not beyond reasonable control" of police officers).

trying to take the bullhorn and flags from the demonstrators and shouting "if you don't get them out, we will." *Id.* Fearing "a riot," one of the officers called in an additional seven officers. *Id.* The officers asked the demonstrators to leave. *Id.* When the demonstrators declined, the officers arrested them. *Id.*

Relying on the demonstrators' "aggressive and rude" behavior, the district court held that the officers' actions were justified by a sufficiently strong interest in averting imminent violence. *Id.* The Eleventh Circuit disagreed and held that the plaintiffs' arrests were unconstitutional. *See id.* at 731. Permissible options, according to the court, would have been "surrounding the speakers or arresting those spectators who threatened violence," or taking the speakers into "temporary protective custody." *Id.* at 731.

d. Must police first try to control or disperse the hostile audience?

Beckerman, *Glasson*, and *Sabel* each indicate that, when faced with a speaker-hostile crowd conflict, a police officer's first response cannot be to arrest the speaker. In the Fifth Circuit, the officer must first try to disperse the hostile audience. *Beckerman*, 664 F.2d at 510. If dispersing the audience becomes *impossible*, the officer can arrest the speaker. *Id.* In the Sixth Circuit, the officer must protect the speaker from violence. *Glasson*, 518 F.2d at 906. If doing so unreasonably subjects the officer to *violent retaliation* and *physical injury*, the officer can intercept the message or remove the speaker for his protection. *Id.* at 909. In the Eleventh Circuit, to ease tension with a hostile audience, an officer can arrest hostile audience members,

surround the speaker, or even take the speaker into temporary protective custody, but cannot arrest the speaker. *Sabel*, 746 F.2d at 731.[4]

In the Ninth Circuit, under the decision below, an officer's first response can be to arrest the speaker. The decision directly conflicts with the cases from the Fifth, Sixth, and Eleventh Circuits discussed above. This Court should grant the writ to harmonize the treatment that lawful demonstrators receive from police officers when hostile crowds oppose the demonstrators.

2. Conflict with this Court regarding suppressing speech because of a hostile audience.

While this Court has not given explicit instruction about when a speaker can be arrested due to the crowd's reaction, this Court has overturned criminal convictions that stemmed from an audience's hostile reaction to a speaker. The Court's decisions indicate that the government's interest in avoiding a hostile audience reaction, even a violent one, does not justify suppressing a speaker.

In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the speaker vigorously "criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare" and a crowd of 1000 onlookers became "angry and turbulent." 337 U.S. at 3. The Court overturned the speaker's conviction for breach of the peace because the

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[4] It appears that the *Sabel* court's precise view was that arrest of the demonstrators was not "a suitably narrow means of achieving" the police's "interest in preventing imminent violence." 746 F.2d at 730-31.

statute allowed conviction for speech that "stirred people to anger, invited public dispute, or brought a condition of unrest." *Id.* A "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4.

In *Gregory v. Chicago*, 394 U.S. 111 (1969), eighty-five people marched to the mayor's house to protest racial segregation. 394 U.S. at 111. "[T]he onlookers became unruly as the number of bystanders increased." *Id.* at 111. The crowd increased to 1000 to 1200 people. *Id.* at 128 (Black, J., concurring). Some shouted, "God damned nigger, get the hell out of here," "Get out of here niggers – go back where you belong or we will get you out of here," and "Get the hell out of here or we will break your blankety-blank head open." *Id.* The demonstrators faced additional "jeers, insults, and assaults with rocks and eggs." *Id.* at 117. In order "to prevent what they regarded as an impending civil disorder," the police "demanded that the demonstrators, upon pain of arrest, disperse." *Id.* at 111-12 (majority). The request to leave was made five times. *Id.* at 129 (Black, J., concurring). Most of the demonstrators refused and were arrested and convicted of disorderly conduct. *Id.* at 112 (majority).

This Court reversed the convictions and said that the "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." *Id.* at 112. "[C]onviction simply because the form of the protest displeased some of the onlookers . . . would encroach on First Amendment rights." *Id.* at 119 (Black, J., concurring) (citations omitted); *accord Hill v. Colorado*, 530

U.S. 703, 715-16 (2000) ("The fact that the messages conveyed by [leafleting, sign displays, and oral communications] may be offensive to their recipients does not deprive them of constitutional protection"; "The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") (citations omitted); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) ("constitutional rights may not be denied simply because of hostility to their assertion or exercise") (quoting *Watson v. Memphis*, 373 U.S. 526, 535 (1963)).

Gregory involved significant violence by those opposed to the speakers' messages, and *Terminiello* addressed a similar threat. In neither case did this Court directly address the issue of *arresting* the speaker due to the crowd's hostility. Yet in each case the Court upheld the speakers' rights to speak. In *Gregory*, this was despite flying rocks and eggs and five requests to disperse. The decision below conflicts with *Terminiello* and *Gregory* because it allows the government to ban a speaker based on the audience's aggressive disagreement with otherwise protected speech. In *Gregory*, the Court chose not to address "the scope of the police obligation to attempt first to deal with the hostile audience." 394 U.S. at 122 (Black, J., concurring). The Court should do so now in order to protect lawful protestors, to provide guidance to lower

courts, and to preserve the authority of this Court's previous decisions.

3. Conflict with this Court and the D.C. Circuit regarding the proper degree of scrutiny.

a. Orin's arrest.

As noted, the Ninth Circuit did not analyze Orin's arrest under the First Amendment. But the decision below makes clear that the police officers arrested Orin for reasons related to the audience's reaction. *See supra* pages 6-7. The decision conflicts with this Court's decision in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), because it fails to recognize and analyze Orin's arrest as a content-based regulation.

In *Forsyth County*, this Court addressed the constitutionality of an ordinance that allowed the government to vary an assembly fee based on the estimated cost of maintaining public order. 505 U.S. at 124. The Court ruled that the ordinance was unconstitutionally arbitrary. *Id.* at 131-33, 137. The Court also held that the ordinance was unconstitutional because the amount of the fee varied with "the public's reaction to the speech." *Id.* at 134. The Court stated, "Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be . . . punished or banned[ ] because it might offend a hostile mob." *Id.* (citations omitted). Yet, in this case, offense to a hostile mob resulted in Orin's arrest.

The decision below also conflicts with *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992), in which the

D.C. Circuit relied on *Forsyth County*. In *Christian Knights*, the Ku Klux Klan sought to parade through the streets of Washington, D.C. 972 F.2d at 367. The district court entered an injunction requiring the District of Columbia ("District") to grant the KKK's request to march eleven blocks, rather than the four blocks the District proposed. *Id.* at 367-68. The D.C. Circuit held that under *Forsyth County*, despite the District's legitimate concerns about the outbreak of violence, the District's four-block limitation was not a content-neutral regulation. *Id.* at 373-74. This is because "[t]he government's interest in constraining a march in light of an anticipated violent response turns on what individuals would be marching, what point they would be trying to make, and how much antagonism, discord and strife this would generate." *Id.* at 373.

b. The college's no-disturbance condition.

The Ninth Circuit held that the college's condition that Orin not create a public disturbance was a content-neutral regulation of speech that was justified by a legitimate state interest – the college's "pedagogical purpose." App. 9. This determination conflicts with *Cox*, in which this Court held that a state "disturbing the peace" statute was facially unconstitutional. 379 U.S. at 550-52. Citing *Terminiello*, 337 U.S. at 4-5, this Court said the statute was unconstitutional because "it sweeps within its broad scope activities that are constitutionally protected free speech and assembly." 379 U.S. at 552.

In addition, the record indicates that regardless of what the college officials told Orin when he first came to

campus, the reason they called the police was either his religious speech or the hostility of the gathering crowd. *See supra* page 3. This reasoning – what might be called the college's no-disturbance condition "as applied" – was not content-neutral and conflicts with this Court's decisions regarding censorship due to a hostile audience. *See supra* pages 14-16.[5]

c. Content-based regulations warrant strict scrutiny.

A permissible content-neutral speech regulation in a public forum must be "narrowly tailored to serve a *significant* governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added; citations omitted). In contrast, if the regulation is based on content, it must be "necessary, and narrowly drawn, to serve a *compelling* state interest." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (emphasis added; citation omitted). *See Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992) (Opinion by Blackmun, J.; Rehnquist, C.J., White, J., and Kennedy, J., concurring; Scalia, J., concurring in judgment) ("Under either a free speech or equal protection theory, a content-based regulation of political

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[5] The actions of the college officials and police officers were content-based for another reason: They regulated only Orin's speech. There is nothing in the record to indicate that the officials or officers took any steps to regulate the speech of the crowd. Thus, the college officials and police officers gave preference to the crowd's views over Orin's views. The First Amendment prohibits this viewpoint discrimination. *Good News Club. v. Milford Central Sch.*, 533 U.S. 98, 121 S. Ct. 2093, 2100 (2001).

speech in a public forum is valid only if it can survive strict scrutiny.") (citation omitted).[6]

Because the scrutiny applied to a content-based regulation is greater than that applied to one that is content-neutral, the conflict of the decision below with this Court in *Forsyth County* and the D.C. Circuit in *Christian Knights* is important. The decision below allows the government to suppress speech without regard to whether the interest involved is truly "compelling" or, even if it is compelling, whether the government's protection of that interest is "necessary, and narrowly drawn." For example, in the present case, how can arresting the speaker exercising his fundamental rights be a "narrowly drawn" response when there is no effort to first restrain those audience members that react with hostility? Orin raised *Forsyth County* in his briefs to the Ninth Circuit, but the court did not address the case.

4. Conflict with this Court regarding the standard for suppressing a speaker who uses inflammatory language.

The record and the decisions below demonstrate that Orin was arrested, if not for his religious speech, then because of the hostile reaction of his audience. However,

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[6] The court of appeals said that the record does not indicate whether the student center quad was a public forum. App. 10. But based on dean Barclay's permission for the demonstration, the court appropriately treated the quad as some type of public forum. *See* App. 10-11 (applying compelling state interest scrutiny of content-based regulations in public forum, from *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

the court of appeals twice refers to incitement of the audience. App. 4, 13. If the decision below is in any way based on alleged incitement by Orin, the district court and the court of appeals failed to apply this Court's standard for suppressing a speaker who uses inflammatory language.

In *Texas v. Johnson*, 491 U.S. 397 (1989), this Court considered Texas's conviction of a demonstrator for burning the American flag. 491 U.S. at 399. The Court found that the burning involved was sufficiently communicative to implicate the First Amendment. *Id.* at 406. Texas claimed that its interest in preventing breaches of the peace justified the conviction. *Id.* at 407. This Court rejected the claim and said that the government cannot assume that provocative ideas will incite riot. *Id.* at 409. Instead, the government must ask "whether the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). The Court assured Texas that "[w]e do not suggest that the First Amendment forbids a State to prevent 'imminent lawless action.' " *Id.* (quoting *Brandenburg*, 395 U.S. at 447). The decision below conflicts with *Johnson* and *Brandenburg* because it approved Orin's arrest without regard to whether he intentionally incited imminent lawless action or violence.

B. The Decision Below Conflicts with This Court's Decisions Regarding Criminalizing Speech Protected by the First Amendment.

The decision below bypasses analysis of Orin's arrest under the First Amendment. The Ninth Circuit held that "*because* police officers Hornberg and McCluskey had probable cause to act against Orin under the Fourth Amendment, they did not violate his First Amendment rights." App. 13 (emphasis added). The probable cause was to arrest Orin for trespass, Wash. Rev. Code § 9A.52.080(1), and failure to disperse, Wash. Rev. Code § 9A.84.020(1). App. 12-13. Yet probable cause is a reasonable belief that a crime has been committed. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). This Court has held that protected First Amendment activity cannot form the basis of a crime.

For example, in *Gregory*, this Court held that "since the trial judge's charge permitted the jury to convict for acts clearly entitled to First Amendment protection, *Stromberg v. California*, 283 U.S. 359 (1931), independently requires reversal of these convictions." 394 U.S. at 113. In *Stromberg*, the Court said that when a defendant is convicted under a statute and "any of the [statute's] clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." 283 U.S. at 368. Likewise, in *Cox*, this Court stated, "We hold that Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals" because in doing so "Louisiana infringed appellant's rights of free speech and free assembly. . . ." 379 U.S. at 545.

This must be the law. If First Amendment protection of an activity did not prevent conviction for that activity, any legislature could override the First Amendment by criminalizing activity that the First Amendment protects. The First Amendment would no longer be supreme over state laws. The same rationale applies to determining probable cause. If First Amendment protection means that the activity in question cannot be a crime for which a person can be convicted, it also means that the activity cannot be a crime for which the person can be arrested.

Under the doctrine of qualified immunity, an officer might argue that although an activity is protected by the First Amendment, the right was not sufficiently clear for him to "understand that what he [wa]s doing violate[d] that right." *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 2156 (2001). But the court below did not reach the "clearly established" step of the qualified immunity analysis in regard to Orin's arrest. App. 12-13; *see Saucier*, 121 S. Ct. at 2156. Instead, the court simply held that probable cause means that there was no First Amendment violation.

In his concurrence to the decision below, Judge Boochever wrote, "The majority cites no authority, and I am aware of none, that indicates the hostile reaction of an audience to a speaker creates probable cause to arrest that speaker." App. 19. Unfortunately, the published decision below now stands for the novel proposition that Judge Boochever criticized. This Court should grant the writ to prevent lower courts within the nation's largest circuit from following the faulty analysis of the decision below and to prevent the First Amendment's subordination to state criminal statutes.

C. Preventing a Heckler's Veto Is an Important Issue Throughout the Nation.

This case particularly warrants the Court's attention because the decision below encourages a "heckler's veto." It permits those who oppose certain ideas to silence those ideas by threatening violence. It rewards those showing hostility or threatening violence and punishes those exercising fundamental constitutional rights. Under the decision below, opponents of the speaker can outnumber the speaker and threaten to riot, to attack the speaker, or to engage in other lawlessness. The hostile audience's reward is the satisfaction of seeing the speaker arrested for his unpopular views.

In contrast, this Court has said, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Johnson*, 491 U.S. at 414 (citations omitted). "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 774 (1994) (citation omitted). "Abridgment of the liberty of [discussion of matters of public interest] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to *test the merits of ideas* by competition for acceptance in the *market of public opinion*." *Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940) (emphasis added; footnote omitted).

Unwelcome and unpopular speech was at the heart of the civil rights and anti-war movements. *See, e.g.*,

Gregory, 394 U.S. 111 (1969); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969); *Cox*, 379 U.S. 536 (1965).[7] Even so, the Supreme Court held that the First Amendment protected the speech. *Gregory*, 394 U.S. at 112-13 (1969); *Tinker*, 393 U.S. at 514; *Cox*, 379 U.S. at 551-52. Had the Court failed to do so, hostility to opposing views would have muted these important contributions to our national exchange of ideas. This Court should grant certiorari to protect the right to express ideas even when those ideas are unwelcome.

CONCLUSION

The decision below is published and will be cited extensively throughout the country's largest circuit. The Ninth Circuit declined to rehear the case en banc. This Court should take up the charge to address "the scope of the police obligation to attempt first to deal with the hostile audience." *Gregory*, 394 U.S. at 122 (Black, J., concurring). Doing so would resolve the Ninth Circuit's

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[7] *See also* Kevin Francis O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 Sw. U. L. Rev. 223, 269 (2000) ("Indeed, many ideas that are now popularly held were once maintained only by a small minority of citizens – including the notions that women should vote and that contraception should not be banned.") (footnote omitted).

conflict with three other circuits, which themselves are inconsistent.

Respectfully submitted,

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United States Court of Appeals,
Ninth Circuit.

Benjamin K. ORIN, Plaintiff-Appellant,
v.
Richard BARCLAY, and his marital community, in his individual and official capacity; Robert Wallace, and his marital community, in his individual capacity; Alan Hornberg, and his marital community, in his individual capacity; Rick McCluskey, and his marital community, in his individual capacity; City of Bremerton, a municipal corporation, Defendants-Appellees.

No. 00-35177.

Argued and Submitted Aug. 10, 2001
Filed Nov. 9, 2001

A. Chad Allred, Ellis, Li & McKinstry, Seattle, Washington, *Theresa Schrempp*, Sonkin & Schrempp, PLLC, Mercer Island, Washington, for the plaintiff-appellant.

Catherine Hendricks, Attorney General's Office, Tort Claims Division, Seattle, Washington; Steven T. Reich, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Seattle, Washington, for the defendants-appellees.

Appeal from the United States District Court for the Western District of Washington; Robert J. Bryan, District Judge, Presiding. D.C. No. CV-99-05125-RJB

Before: *BOOCHEVER*, *TASHIMA*, and *TALLMAN*, Circuit Judges.

TALLMAN, Circuit Judge:

Plaintiff Benjamin Orin was told by a community college official that he could protest abortion on campus only if he did not create a disturbance, interfere with students' access to school buildings, or couch his protest in overtly religious terms. After four factious hours of demonstration, campus security asked Orin to leave because he was violating these conditions. When he refused, campus security called City of Bremerton police officers who, after asking Orin to leave twice more, arrested him for criminal trespass and failure to disperse.

We must determine whether the conditions imposed on the protest violated Orin's clearly established First Amendment rights such that the school officials, the police officers, or the City of Bremerton may be liable to Orin for damages under 42 U.S.C. §§ 1983 and 1985(3). We must also determine whether the district court properly held that none of Orin's state tort law causes of action can survive summary judgment. We have jurisdiction, and affirm in part and reverse in part.

I

Orin is a member of Positively Pro-Life, an anti-abortion group that demonstrates at high schools, colleges, and medical clinics around the Northwest. On October 30, 1997, Orin and Jim McIntyre appeared unannounced in the office of Richard Barclay, Interim Dean of Students at Olympic Community College ("OCC").[1] They warned Barclay that they and a third Positively Pro-Life

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[1] OCC is a two-year junior college operated by the State of Washington.

member intended to stage an anti-abortion protest on OCC's main quad. The protest was to include display of two large posters graphically depicting aborted fetuses in various states of dismemberment. They warned Barclay that the signs had elicited strong responses at prior protests, including physical violence.

Barclay informed the protestors that they must apply for and obtain a permit from OCC if they wished to hold an event on the quad. Orin responded, "We have a prior permit. The Bill of Rights says we can be here." Barclay told Orin that he could conduct the demonstration without a permit so long as he did not: (1) breach the peace or cause a disturbance; (2) interfere with campus activities or access to school buildings; or (3) engage in religious worship or instruction. The protestors then left for the main quad. Barclay dispatched two security guards to monitor the demonstration.

The Dean's Office began receiving student complaints about the protestors and their posters soon after the protest began. OCC accommodated the demonstration for approximately four hours. The size and temperament of the crowd attracted by the demonstration waxed and waned. At times there were only five or six students; at other times there were more than one hundred. On two occasions campus security had to interpose themselves between the crowd and the protestors to avert physical violence.

Shortly after 4:00 p.m., OCC security chief Robert "Rocky" Wallace asked the protestors to leave. When they refused, he called to request police assistance. He called again moments later to ask dispatch to expedite the

response because the situation was "turning physical." The parties hotly dispute the events that precipitated Wallace's call to the police.

The demonstrators allege that Barclay appeared at the protest and informed them that if they "mentioned God or referred to th[e] Bible [he] would have [them] arrested and physically removed from campus." Orin allegedly responded that he would continue to decry abortion in religious terms and that Barclay would have to have him arrested. Barclay responded that he would do so, and the police arrived ten to fifteen minutes later. The demonstrators allege that they uttered no incendiary epithets and that they never felt threatened by the crowd.

By contrast, the security officers allege that the demonstration degenerated into an openly hostile incitement of an already angry crowd. Four students submitted declarations in support of the officers, indicating that they felt the demonstrators were "verbally assaulting students" and "attempting to pick a fight." They claim they heard the protestors call students "baby killers" and use incendiary racial and sexist epithets. In the security officers' estimation, physical conflict between the students and the demonstrators was inevitable. The security guards asked the demonstrators to leave because they "could no longer control the situation and the situation was turning physical."

Officer Alan Hornberg of the Bremerton Police Department was dispatched to OCC to respond to "a reported group of protesters that were refusing to leave and a large unruly crowd that was getting out of hand." Wallace met Hornberg at the edge of campus. As they

walked to the quad, where the demonstration was being held, Wallace told Hornberg that the protestors had violated the conditions placed on them by Barclay, "the student crowd was agitated to the point of physical violence against the protesters," and "the security staff didn't feel that they had the manpower to protect the anti-abortion protesters from the students." He also informed Hornberg that McIntyre had hit one of the security officers, knocking his hat off his head.[2]

Upon arriving at the quad, Hornberg observed a crowd of forty to fifty students shouting angrily at the demonstrators. Hornberg approached the demonstrators and asked them to leave. Orin told Hornberg that campus officials only wanted him arrested because he was talking about religion. Orin then exclaimed that he was exercising his First Amendment right to free speech and "was not going anywhere." Hornberg again asked Orin to leave. When Orin again refused, Hornberg arrested him for criminal trespass and failure to disperse.

Bremerton Police Officer Rick McCluskey arrived after Orin's arrest. Hornberg reported that Orin was under arrest for trespassing and failing to disperse. McCluskey told Hornberg to take Orin to jail for booking.

Orin alleges that, upon reaching the jail, Hornberg questioned him without first reading him his *Miranda* rights. According to Orin, however, when he asked about his rights, Hornberg recited them to him. Orin also alleges a number of constitutional violations arising out

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[2] McIntyre alleges that he was gesticulating to emphasize a point and that he struck the officer accidentally.

of the conditions of his jail cell (it was cold, dirty, and uncomfortable), the ingredients used in the jail food (it was not vegetarian), and the conduct of jail personnel.

Orin sued Dean Barclay, security officer Wallace, police officers Hornberg and McCluskey, and the City of Bremerton, stating five causes of action: (1) violation of his First Amendment rights[3] compensable under 42 U.S.C. § 1983; (2) conspiracy to violate those rights compensable under 42 U.S.C. § 1985(3); (3) false arrest; (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. Defendants moved for summary judgment on all claims.

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[3] Orin also argues that the defendants violated his rights under the Fourth Amendment and the Equal Protection Clause. The Fourth Amendment claim was not alleged in Orin's Complaint, so we do not address it at length. It suffices to say that our analysis of qualified immunity with regard to Orin's First Amendment claim is equally applicable to his Fourth Amendment claim.

Orin made only passing reference to Equal Protection in his Complaint and dedicated to it only one sentence in his opening brief on appeal. Because Orin's Equal Protection claim appears to be no more than a First Amendment claim dressed in equal protection clothing, we heed the advice of an enlightened treatise:

> It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights.

John E. Nowak, Ronald D. Rotunda & J. Nelson Young, Handbook on Constitutional Law (1978). Accordingly, we treat Orin's equal protection claim as subsumed by, and co-extensive with, his First Amendment claim.

The district court found that the individual defendants were entitled to qualified immunity against Orin's First Amendment claims. The district court granted all defendants' motions for summary judgment as to Orin's remaining claims. Orin timely appealed.

II

A district court order granting summary judgment as to all claims and all parties constitutes a "final order" over which we have jurisdiction. 28 U.S.C. § 1291 (2000). We review a district court order granting summary judgment de novo, construing all evidence and drawing all reasonable inferences in favor of the non-moving party. *See Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 817 (9th Cir. 1999).

A

Section 1983 permits an individual whose federal statutory or constitutional rights have been violated by a public official acting under color of state law to sue the official for damages. 42 U.S.C. § 1983 (2000). Public officials are afforded protection, however, "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Qualified immunity shields them "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. If a public official could reasonably have believed that his actions were legal in light of clearly established law and the information he possessed at the time, then

his conduct falls within the protective sanctuary of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

To determine whether each individual defendant is entitled to qualified immunity, we must first determine whether Orin has stated a *prima facie* claim that a defendant violated his constitutional rights. *Saucier v. Katz*, 121 S.Ct. 2151, 2155 (2001). If we determine that Orin has stated a *prima facie* claim that a particular defendant violated his constitutional rights, then we must determine whether the rights allegedly violated were clearly established by federal law. *Id.*

The Supreme Court has explained that a right is clearly established by federal law if:

> The contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal citations omitted). In other words, Orin's rights were clearly established if reasonable public officials in the defendants' respective positions would have known, "in light of clearly established law *and the information the officers possessed*," that their conduct violated his rights. *Hunter*, 502 U.S. at 227 (emphasis added).

Orin argues that the conditions imposed by Barclay and enforced by Wallace violated his First Amendment rights to free speech and the free exercise of religion. Barclay imposed three conditions on Orin's demonstration. The first two – not to create a public disturbance and not to interfere with campus activities or access to school buildings – are content-neutral regulations. *See Hill v. Colorado*, 530 U.S. 703, 719 (2000) (holding that regulation of expressive activity is content-neutral if it is justified without reference to the content of regulated speech). So long as such content-neutral regulations are narrowly tailored to accomplish a legitimate government purpose they are not proscribed by the First Amendment. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). The first two conditions survive constitutional scrutiny because they do not distinguish among speakers based on the content of their message and they are narrowly tailored to achieve OCC's pedagogical purpose. *See Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981) (holding that a public university may "impose reasonable regulations compatible with [its educational] mission upon the use of its campus and facilities"); *Healy v. James*, 408 U.S. 169, 184 (1972) ("[A] college has a legitimate interest in preventing disruption on the campus.").

The third condition – to refrain from religious worship or instruction – is more problematic. "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). "Accordingly,

we have not excluded from free-speech protections religious proselytizing, or even acts of worship." *Id.* (citations omitted). Protection of such expression on public property is not absolute, however. *Id.* The measure of protection afforded such expression is determined by the status of the public property on which it occurs. Public property may be designated, by law or tradition, as a public forum or may be set aside for some other public purpose. *Id.*

The record before us does not indicate whether OCC has, in general, designated its quad as a public forum. *See Widmar,* 454 U.S. at 267 n. 5 ("We have not held . . . that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings."); *Souders v. Lucero,* 196 F.3d 1040, 1044 (9th Cir. 1999) (noting that a public university may exclude from its campus a nonstudent whose conduct endangers a student). The parties do not dispute, however, that Dean Barclay told the demonstrators that they could use OCC's quad for expressive purposes so long as they observed three conditions. Having created a forum for the demonstrators' expression, Barclay could not, consistent with the dictates of the First Amendment, limit their expression to secular content. *See Widmar,* 454 U.S. at 267 (holding that once a university creates a forum, it must "justify its discriminations and exclusions under applicable constitutional norms").

The third condition imposed by Barclay constitutes a content-based regulation that we may uphold only if it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar,*

454 U.S. at 270. Barclay informed Orin that this condition was required by the Establishment Clause in order to maintain the separation of Church and State. The Supreme Court has ruled, however, that the First Amendment does not require public institutions to exclude religious speech from fora held open to secular speakers. In fact, it prohibits them from doing so.

In *Widmar*, a public university defended its regulation excluding religious student organizations from campus facilities on the grounds that it was required by the Establishment Clause to observe a strict separation of Church and State. *Id.* at 263. The Court rejected the university's argument, holding that allowing religious organizations the same access to school facilities enjoyed by secular organizations did not violate the Establishment Clause. Since the governmental interest that purported to justify regulation was based on a misunderstanding of the Establishment Clause, the Court struck the regulation down as a content-based regulation of First Amendment rights of assembly, free exercise, and free speech that was not narrowly tailored to serve a compelling government interest. *Id.* at 278.

Barclay's "no religion" condition runs squarely afoul of *Widmar*. Having permitted Orin to conduct a demonstration on campus, Barclay could not, consistent with the First Amendment's free speech and free exercise clauses, limit his demonstration to secular content. *Widmar* and its progeny clearly establish this proposition. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995). *See also Good News Club v. Milford Cent. Sch.*, 121 S.Ct. 2093, 2104 (2001). Orin's First Amendment rights, in

the context of this case, were clearly established. A reasonable public official should have known that permitting Orin to express his views on abortion only so long as those views were not religious in nature violated his First Amendment rights. We reverse the district court's holding that Barclay has qualified immunity against Orin's First Amendment claim and remand for trial.

We must also reverse the district court's determination that security officer Wallace had qualified immunity against Orin's First Amendment claim. At the summary judgment stage, the "threshold question" in determining whether a public official has qualified immunity is whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 121 S.Ct. at 2156. It is unclear on the record before us whether Wallace asked Orin to leave campus because he had violated Barclay's "no religion" condition or because he had violated one of the other two, inoffensive conditions. Construing the facts in the light most favorable to Orin, as we must at this stage, he has properly alleged that Wallace violated his clearly established First Amendment rights. Accordingly, we reverse the district court's determination that Wallace is entitled as a matter of law to qualified immunity against Orin's First Amendment claim.

The district court properly held that police officers Hornberg and McCluskey have qualified immunity. The undisputed evidence indicates that they arrested Orin not because of the religious content of his speech, but rather because they reasonably believed they had probable

cause to arrest him for trespass and failure to disperse. Police dispatch informed Hornberg only that a group of protestors was inciting a large, unruly crowd. Security officer Wallace told Hornberg only that the demonstrators had violated the conditions of their revocable license to remain on campus and were creating an unsafe, potentially riotous situation. Hornberg's personal observation of the demonstration confirmed these reports – he witnessed forty to fifty angry people shouting at the demonstrators. The record confirms that Hornberg could reasonably have believed that he was not violating Orin's First Amendment rights because he had probable cause to arrest Orin for violating Washington's laws pertaining to trespass and failure to disperse.

Similarly, Hornberg informed McCluskey that he asked Orin to leave because he was creating a disturbance and blocking entrance to school buildings and that he arrested Orin for trespass and failure to disperse. Based on this information, McCluskey could reasonably have believed that his direction to Hornberg to take Orin to jail for booking did not violate any of Orin's constitutional rights. We affirm the district court's decision that, because police officers Hornberg and McCluskey had probable cause to act against Orin under the Fourth Amendment, they did not violate his First Amendment rights.

Finally, the City of Bremerton is not liable on Orin's First Amendment claim. A plaintiff properly alleges a § 1983 action against a local government entity only if "the action that is alleged to be unconstitutional implement[ed] or execute[d] a policy statement, ordinance,

regulation, or decision officially adopted and promulgated by that body's officers," *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690 (1978), or "the city made a 'deliberate' or 'conscious' choice to fail to train its employees adequately." *Mackinney v. Nielsen*, 69 F.3d 1002, 1010 (9th Cir. 1995). A § 1983 action against a city fails as a matter of law unless a city employee's conduct violates one of the plaintiff's federal rights. Because the record reveals that neither Officer Hornberg nor Officer McCluskey violated Orin's First Amendment rights, it follows as a matter of course that Orin's action against the City of Bremerton fails. The district court's grant of summary judgment in favor of the City of Bremerton is therefore affirmed.

B

Orin argues that the district court erred by dismissing his claim under 42 U.S.C. § 1985(3). Section 1985(3), originally enacted by the Reconstruction Congress as the Klu Klux Klan Act of 1871, provides in pertinent part:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so . . . deprived may have an action for the recovery of damages occasioned by such . . . deprivation, against any one or more of the conspirators.
>
> 42 U.S.C. § 1985(3) (2000).

To prove a violation of § 1985(3), Orin must show "some racial, or perhaps otherwise class-based,

invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, *must aim at* a deprivation of the equal enjoyment of rights secured by the law to all." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis added). Nothing in the record indicates that any of the defendants' actions were motivated by "invidiously discriminatory animus." Accordingly, we hold that the district court properly granted summary judgment in favor of the defendants on Orin's § 1985(3) claim because Orin failed "to make a showing sufficient to establish the existence of an element essential to" his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).[4]

C

Orin's state law claim of false arrest fails because Hornberg and McCluskey had probable cause to arrest

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[4] Nor is it clear that Orin qualifies as a member of a class to which the protections of § 1985(3) apply, either by being an abortion protestor or by being a speaker who would convey a religious message on a public college's campus. The term "class," as used in the statute "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993). The Supreme Court has held that "opposition to abortion" does not identify a "class" protected by § 1985(3). *Id.* We have held that § 1985(3) extends "beyond race only when the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). Orin has made no such showing.

him. A police officer has probable cause to effect an arrest if "at the moment the arrest was made . . . the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect had violated a criminal law. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The information conveyed to Hornberg by police dispatch and security officer Wallace indicated only that the demonstrators had violated the conditions pursuant to which they had been permitted on campus, and that OCC security could no longer protect the demonstrators from a large, unruly crowd stirred to violence by the demonstrators' conduct. Orin offers no evidence that the police officers knew what those conditions were. Hornberg confirmed the dispatcher's information with his own observations upon his arrival at the OCC quad.

The facts then known to Hornberg were sufficient to establish probable cause to arrest Orin for criminal trespass under RCW § 9A.52.080 because a reasonable officer could have concluded that Orin had remained unlawfully on OCC's premises after being asked by college officials to leave. Hornberg also had probable cause to arrest Orin under Washington's failure to disperse statute, RCW § 9A.84.020. A person fails to disperse in violation of RCW § 9A.84.020 if he "congregates with a group of three or more other persons . . . [that] create[s] a substantial risk of causing injury to any person, or substantial harm to property" and "refuses or fails to disperse when ordered to do so by a peace officer." Orin was amidst an angry crowd of forty to fifty people. A prudent man observing the scene could easily have believed that the

crowd created a substantial risk of injury or property damage.

"[P]robable cause is a complete defense to an action for false arrest and imprisonment." *Hanson v. City of Snohomish*, 852 P.2d 295, 301 (Wash. 1993) (en banc). The district court properly granted summary judgment dismissing Orin's false arrest claim.

D

Under Washington law, the elements of intentional infliction of emotional distress, also known as outrage, are: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Rice v. Janovich*, 742 P.2d 1230, 1238 (Wash. 1987). To establish the tort of outrage, Orin must show that the conduct giving rise to his claim was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 530 P.2d 291, 295 (Wash. 1975) (en banc). Orin has simply not alleged that any named defendant engaged in any conduct that rises to the level of atrocity and incivility required by Washington law.[5]

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[5] We need not address whether the conduct of Orin's jailers would constitute outrage because Orin did not name them as defendants. We also need not address whether the City of Bremerton can be held liable for the jailers' conduct because Orin does not allege that their conduct was the result of lack of training or a pattern, practice, or custom of mistreating prisoners.

— E

To establish negligent infliction of emotional distress under Washington law, Orin must show that defendants breached a legal duty thereby causing Orin to suffer objective symptoms of emotional distress. *See Hunsley v. Giard*, 553 P.2d 1096, 1102-03 (Wash. 1976) (en banc). Such symptoms must be "susceptible to medical diagnosis and proved through medical evidence." *Marzolf v. Stone*, 960 P.2d 424, 431 (Wash. 1998). Orin properly states that the defendants had a duty not to arrest him without probable cause. But Orin's arrest was supported by probable cause. Defendants therefore did not breach the duty alleged by Orin, and cannot be found negligent. Accordingly, the district court did not err by granting summary judgment dismissing Orin's claim for negligent infliction of emotional distress.

III

Each party shall bear its own costs on appeal. *See Fed. R. App. P. 39.* The judgment of the district court is

AFFIRMED in part; REVERSED in part; and REMANDED.

BOOCHEVER, Circuit Judge, concurring:

I concur in the result reached by the majority. Because I believe Officers Hornberg and McCluskey are entitled to qualified immunity, I agree that we should affirm the district court's grant of summary judgment to these defendants. However, the majority opinion goes beyond what is necessary for qualified immunity analysis, concluding that Officers Hornberg and McCluskey

did not violate Orin's First Amendment rights because they had probable cause to arrest him for trespass and failure to disperse. In my view, these additional conclusions are unnecessary and unwarranted. Because the qualified immunity question is sufficient to dispose of the case against Officers Hornberg and McCluskey, our analysis need not go further. Moreover, I cannot agree with the majority's conclusion that the officers had probable cause to arrest Orin.

Probable cause to arrest without a warrant exists when the facts and circumstances known to the arresting officer are sufficient to lead a prudent person to believe the suspect has committed, is committing, or is about to commit a crime. *Mackinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995). Viewing the facts in the light most favorable to Orin, as we must on summary judgment, no prudent person would have thought Orin was doing anything illegal. To the contrary, the record suggests that Orin was arrested because the police and campus security were afraid that *observers of the protest* were getting violent and would harm the protesters. The majority cites no authority, and I am aware of none, that indicates the hostile reaction of an audience to a speaker creates probable cause to arrest that speaker.

Under Washington law, the elements of failure to disperse are 1) "congregat[ing] with a group of *three or more other persons* [when] there are acts of conduct *within that group* which create a substantial risk of causing injury," and 2) "fail[ing] to disperse when ordered to do so by a peace officer." Wash. Rev. Code § 9A.84.020(1) (2001) (emphasis added). However, there were only two other members of Orin's group, so the police could not

have observed Orin congregating with "three or more persons." More importantly, viewing the facts in Orin's favor, neither he nor members of his group were engaging in conduct that created a substantial risk of injury.[1] Even if members of the crowd were engaging in such conduct, that did not create probable cause to arrest Orin for failure to disperse.

A person is guilty of trespass if "he knowingly enters or remains unlawfully in or upon premises of another." Wash. Rev. Code § 9A.52.080(1) (2001). If the property in question is a public place, however, a person's presence there is not unlawful as long as the person has complied with "all lawful conditions imposed on access to or remaining in the premises." *Id.* § 9A.52.090(1); *State v. Finley*, 982 P.2d 681, 686 (Wash. Ct. App. 1999); *State v. R.H.*, 939 P.2d 217, 219-220 (Wash. Ct. App. 1997). In other words, if the premises are open to the public, violating a lawful condition of access is a necessary element of criminal trespass under Washington law. *See R.H.*, 939 P.2d at 220.

In the present case, Orin provided evidence that the protesters were complying with the *lawful*, content-neutral conditions imposed by Dean Barclay. The campus security officers admitted that the protesters complied when asked to move away from entrances to buildings.

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[1] There was evidence that one of the protesters, McIntyre, swung at a campus security officer, knocking the officer's hat off his head. However, McIntyre claimed this was an accident. At any rate, viewing the facts in Orin's favor, this incident does not amount to conduct on the part of the protesters that would create a "substantial risk of injury."

Officer Hornberg, in his deposition, did not mention seeing Orin blocking access to buildings or otherwise violating Dean Barclay's lawful conditions. Upon arriving on campus, Officer Hornberg observed the protesters standing with their backs against a planter box, and feared violence on the part of a crowd encircling the protesters, not violence by the protesters themselves. Thus, the only information available to Hornberg that indicated Orin might be breaking the law was Wallace's statement that the protesters were violating conditions imposed on them by Dean Barclay. Before Orin was arrested, however, Orin specifically told Hornberg that Barclay and Wallace wanted the protesters to leave only because they were talking about religion. This undermined Hornberg's reason for believing Orin was trespassing, and should have put him on notice that Orin was not violating any *lawful* conditions placed on access to the campus. Under these circumstances, I cannot agree with the majority's conclusion that there was probable cause to arrest Orin for trespass.

In performing their jobs, police officers must often make split-second judgments in dangerous situations. Qualified immunity recognizes that they sometimes make mistakes, and protects them from liability when their mistakes are reasonable. *See, e.g., Saucier v. Katz*, 121 S.Ct. 2151, 2158 (2001). Because I believe Officers Hornberg and McCluskey were mistaken, but reasonably so, I agree they are entitled to summary judgment. I cannot join the majority opinion, however, to the extent it concludes that the hostile reaction of an audience to a speaker creates probable cause to arrest that speaker. In my view, "the proper response to potential and actual violence is . . . to

arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure." *Collins v. Jordan,* 110 F.3d 1363, 1372 (9th Cir. 1996).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BENJAMIN ORIN, Plaintiff, v. RICHARD BARCLAY and his marital community, in his individual and official capacity, et al, Defendants.	Case No. C99-5125RJB ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Jan. 21, 2000)

This matter comes before the court on the Motion for Summary Judgment of Defendants Richard Barclay and Robert (Rocky) Wallace (Dkt. #22) and the Motion for Summary Judgment of Defendants Alan Hornberg, Rick McClusky, and the City of Bremerton (Dkt. #24).[1] The court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

SUMMARY JUDGMENT STANDARD

The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

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[1] Since these motions pertain to the same events and have similar issues, the court will address the motions together.

There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(c). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., the preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 2554; *T.W. Elec. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Service*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

FACTUAL BACKGROUND

The plaintiff, Richard Orin, is a member of a group called Positively Pro-Life whose primary purpose is to demonstrate against abortion. Typically, small groups of Positively Pro-Life members go around to high schools, colleges, and abortion clinics where they show 4' by 5' very graphic and disturbing pictures of damaged, aborted fetuses. Ex. 1 and 2 to Declaration of Steven Reich. When appearing at schools, the group regularly use a certain method of demonstration which entails contacting the dean or principal on the day of the demonstration, announcing their intention to demonstrate, and proceeding to a part of the school or school pathways where the most students will view the signs. Usually, the signs invoke strong reactions from the students, ranging from polite to violent. During the time that the plaintiff and other members of the group have engaged in these demonstrations, they have been arrested, assaulted, threatened, and had the signs destroyed on numerous occasions. Almost every time they have appeared at a school, the police have been called to investigate a disturbance.

On the morning of October 30, 1997, the plaintiff, along with an older man identified as Jim McIntyre, approached the secretary of Defendant Richard Barclay, the interim Dean of Student Affairs for Olympic College. A third member of the plaintiff's group, Sara Shaper, remained outside the building. Mr. Orin loudly demanding [sic] to see the dean, although he did not have an appointment. On gaining entry to Dean Barclay's office, Mr. Orin informed Dean Barclay that he wanted to stage a small anti-abortion demonstration on the Olympic College

campus later that morning. Mr. Orin, who was not an enrolled student, had not sought advance permission for his demonstration nor had he gone through any permitting process required by the college. Mr. Orin also advised Dean Barclay that he intended to show the graphic photographs of aborted fetuses to make his points. Dean Barclay, who was in his second day as the interim dean, granted Mr. Orin permission to have his demonstration, provided that he did not disrupt classes, the educational process, or students' access to classes. Dean Barclay also instructed the demonstrators not to engage in religious instruction or worship which was prohibited by campus regulations. Two campus security guards, Mark Pritchett and Richard Anderson, were assigned to stay with the demonstrators for their protection.

The demonstration began at approximately 11:50 a.m. with Mr. Orin, Mr. McIntyre, and Ms. Shaper outside of the Bremer Student Center. Shortly thereafter, students began arriving at Dean Barclay's office complaining about the demonstration and its confrontational nature. The size of the student crowd around the demonstration swelled and shrank during the afternoon. The defendants presented declarations from several witnesses stating that the demonstrators shouted things such as "you are all baby killers," "you will burn in hell," "man-haters," "lesbians," "sluts," "whores," and "girls like you are bitches" to passing students and to those in the crowds. Declaration of Mark Pritchett, Megan Fugate, Bridge Holloway-Heim, and Wendy Wolfe-Major. Witnesses also stated that the demonstrators shouted such epithets as "niggers" and "monkeys" at African-American students. Declaration of

Mark Pritchett, Richard Anderson, and Wolfe-Major. Several times the security guards or other students were forced to get between the demonstrators and students to prevent fights. Declarations of Rocky Wallace, Pritchett, and Sarah Berkland. At various time [sic], the demonstrators blocked pathways and were asked to move. Eventually, the demonstrators worked their way back to their original positions. Young children passing by the demonstration on their way to and from the campus day care center saw the posters of the damaged babies which were deliberately placed in view of the children by the demonstrators. The children became visibly upset and several started to cry. Declarations of Pritchett, Anderson, Fugate, Holloway-Heim, Wolfe-Major, and Berkland.

At approximately 4:15 p.m., the demonstration started to attract a larger crowd of students and shouting marches between the demonstrators and students increased, both in volume and in threatening postures. One shouting match was followed by a pushing match between the demonstrators and an African-American student reported called "Jamaica Man" by one of the demonstrators. Declarations of Anderson (who knew the African-American student personally) and Wolfe-Major. The plaintiff contends that he and his fellow demonstrators did not engage in any name calling, and that at all times, they were peaceably reading from the Bible and expressing their views in opposition to abortion. Although the plaintiff admits that Mr. McIntyre called a student "Jamaica Man," he was simply referring to a possible place of origin in lieu of his name, since he wanted to engage the student in conversation and he did not know his name. Further, the plaintiff contends that

the threats of violence were made only by the students. Declarations of Richard Orin, Jerome Watson, Jim McIntyre, and Sara Shaper.

Defendant Campus Security Chief Robert "Rocky" Wallace stepped in when he believed that the potential for serious violence was becoming a reality. Students warned the campus security officers that, if security did not remove the demonstrators, the students would. Concerned as much for the safety of the demonstrators as for the students, Chief Wallace asked Mr. Orin several times to stop the demonstration and to leave the campus. The plaintiff refused each time, and finally the Bremerton Police were called.

Defendants Bremerton Police Officers Alan Hornberg and Rick McClusky contacted Chief Wallace and received information about the course of the demonstration. The officers then observed the demonstration, and contacted Mr. Orin, asking him and his colleagues to disband and to leave the campus. The officers told Mr. Orin that he was violating campus and state law by his actions and refusal to leave. After repeated refusals and confrontational gestures, Mr. Orin was arrested. He was booked into the Kitsap County Jail on charges of Failure to Disperse, Criminal Trespass, and Possession of a Controlled Substance. The prosecutor declined to file formal charges against the plaintiff.

The plaintiff alleges that the defendants conspired to violate his constitutional rights to free speech and free exercise of religion protected by the First Amendment to the U.S. Constitution and Article One of the Washington State Constitution. He sues under 42 U.S.C. §§ 1983;

1985(3), and alleges state law torts of false arrest, negligent infliction of emotional distress, and intentional infliction of emotional distress (outrage). The plaintiff alleges that the City of Bremerton failed to adequately supervise and/or train its police officers, and that the City had policies or customs allowing the violation of civil rights. The defendants deny all of the plaintiff's claims and move for summary judgment of dismissal.

ISSUES

The issues presented in the two motions are:

1) Whether Defendants Barclay, Wallace, Hornberg and McClusky are entitled to qualified immunity for the alleged violations of the plaintiff's civil rights.

2) Whether Defendants Barclay, Wallace, Hornberg, McClusky, and City of Bremerton are liable for an alleged conspiracy to violate the plaintiff's civil rights.

3) Whether the plaintiff has stated sufficient facts to prove that the City of Bremerton failed to adequately supervise and/or train the defendant officers, or that the City of Bremerton maintained policies or customs that allowed civil rights violations.

4) Whether the plaintiff has stated sufficient facts to prove the tort of false arrest.

5) Whether the plaintiff has presented sufficient factual issues for the tort of negligent infliction of emotional distress.

6) Whether the plaintiff has presented sufficient factual issues for the tort of intentional infliction of emotional distress (outrage).

DISCUSSION

A. Federal Claims.

1) Whether Defendants Barclay, Wallace, Hornberg and McClusky are entitled to qualified immunity for the alleged violations of the plaintiff's civil rights.

When considering an officer's assertion of qualified immunity, the court must apply a two part test. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). In *Collins v. Jordan*, 110 F.3d 1363, 1369-70 (9th Cir. 1997), the Ninth Circuit recently summarized the application of the doctrine of qualified immunity on summary judgment.

> *The court must first determine whether the plaintiff has alleged a violation of a right that is clearly established and stated with particularity.* The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The plaintiff bears the burden of showing that the right he alleges to have been violated was clearly established. *Second, the court must consider whether, under the facts alleged, a reasonable official could have believed that his conduct was lawful..* It is the defendant's burden to show that "a reasonable . . . officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right. Of course, if the facts alleged by the defendant officer could not support a reasonable belief that his conduct

> was unlawful, he is not entitled to qualified immunity.

110 F.3d at 1369-70 (citations and internal quotations omitted; emphasis added). If the material facts are undisputed, the question of whether a reasonable officer could have believed his conduct was lawful given the totality of the circumstances is a determination of law that can be decided on summary judgment. *Id.* (relying on *Act Up!*, 988 F.2d at 873). "If, however, there is a material dispute as to the facts and circumstances that an officer knew or should have known, or as to the facts regarding what the officer or the plaintiff actually did, the case must proceed to trial." *Id.*

Here, the test for qualified immunity must be addressed separately for each of the four alleged constitutional violations: equal protection, free speech, free exercise of religion, and false arrest.

A. Equal Protection.

"The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation and internal quotation marks omitted); *see also Mlikotin v. City of Los Angeles*, 643 F.2d 652, 654 (9th Cir. 1981) (stating that the allegation of "unequal treatment of persons similarly situated . . . [is] the gravamen of a complaint for denial of equal protection"). To maintain a selective enforcement claim based on an equal protection violation, the plaintiff must show: (1) that others are generally not prosecuted for the same conduct; and (2) the decision to single out the plaintiff was based upon impermissible grounds such

as race, religion, or the exercise of constitutional rights. *Benigni v. City of Hemet,* 879 F.2d 473, 477 (9th Cir. 1988) (citing *Wayte v. United States,* 470 U.S. 598, 608 (1985); *Church of Scientology v. Commissioner of Internal Revenue,* 823 F.2d 1310, 1320-21 (9th Cir. 1987). An equal protection claim based on selective law enforcement activities is judged according to ordinary standards and the plaintiff must show both a discriminatory effect and a discriminatory motivation. *Benigni,* 879 F.2d at 477.

Here, the defendants deny that they singled out the plaintiff for investigation or arrest based on any discriminatory intent, or that his investigation or arrest had a discriminatory effect. The plaintiff argues that he was denied equal protection because he was singled out due to the exercise of his free speech and free religion rights.

The plaintiff's argument does not meet the proof required by the *Benigni* decision. The plaintiff makes no showing that others are generally not arrested for similar conduct, nor does he show any discriminatory motivation on the part of the defendants. The evidence shows that the arrest of the plaintiff was not based on the content of his speech of the free exercise of his religion, but on his conduct. The defendants' motion on this issue should be granted and the plaintiff's equal protection claim should be dismissed on the grounds of qualified immunity.

B. Free Speech; C. Free Exercise of Religion . . .

The First Amendment does not protect violence. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 916 (1982) *See also Roberts v. United States Jaycees,* 468 U.S. 609, 628

(1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); When such conduct occurs in the context of constitutionally protected activity, some type of regulation is permitted. *Claiborne Hardware Co.*, 458 U.S. at 916.

The free exercise of religion means "the right to believe and profess whatever religious doctrine one desires," excluding all "governmental regulation of religious beliefs as such." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). The government may not 1) compel affirmation of religious belief, 2) punish the expression of religious doctrines it believes to be false, 3) impose special disabilities on the basis of religious views or religious status, or 4) lend its power to one or the other side in controversies over religious authority or dogma. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted). A person's religious beliefs does [sic] not excuse him from compliance with an otherwise valid law prohibiting conduct that the state may regulate. *Id.* at 876. *See also Minersville School Dist. Bd. of Ed. v. Gabitis*, 310 U.S. 586, 594-595 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted).") "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to

permit every citizen to become a law unto himself." *Employment Div,* 494 U.S. at page 879 (quoting *Minersville School,* 310 U.S. at 166-167).

The defendants argue that they only stepped in when they determined that the plaintiff's speech was inciting potential violence, violating conditions preestablished by the college, and when the plaintiff refused to leave the campus. The defendants also argue that they have the right to enforce regulations when violence appears imminent.

The plaintiff contends that the defendants enforced religious guidelines established by the college, which the plaintiff contends are discriminatory both in content and viewpoint. Further, the plaintiff argues that there are numerous factual issues that preclude summary judgment.

Here, the plaintiff's right to free speech and free exercise of religion was firmly established at the time of this incident. Further, the parties do not dispute that the right to free speech does not include violence. Although the plaintiff's position on this issue focuses on the alleged unconstitutionality of the guidelines set by the college, that is, that the plaintiff refrain from religious instruction or worship, the plaintiff's claims derive from his arrest and removal from the campus. The defendants' actions to stop the demonstration which included religious speech, were not designed to prevent the speech or the exercise of religion. They were designed to avoid violence to all concerned, including the plaintiff.

Defendants Hornberg and McClusky are police officers employed by the City of Bremerton and there is no

showing that they had any connection with the establishment of college policies pertaining to demonstrations, or that they were enforcing college guidelines. Rather, according to the defendants, Officers Hornberg and McClusky received a report of escalating confrontation between demonstrators and students, and when they arrived and investigated, they verified that what they had learned was accurate. There is no evidence that the content or the viewpoint expressed by the plaintiff had any relevance to the officers' actions. Based on the officers' knowledge, they had no reason to believe that their conduct in arresting the plaintiff violated of [sic] his free speech or religion rights.

As to Defendants Barclay and Wallace, these defendants allowed the plaintiff's demonstration to take place, on the condition that it was peaceable [did], not interfere with the educational process, and [did] not include religious education or worship. The defendants did not interfere with the plaintiff's demonstration until the plaintiff and his companions' violations of the first two conditions caused a major problem. The evidence shows that the demonstration was far from peaceable by the time the police were called. The demonstrators were in clear danger of assault by the students, and the students were in danger of assault by fellow students or simply as a result of mass chaos. The clear preponderance of the evidence is that the plaintiff's confrontational actions and his refusal to leave the campus caused the defendants to take action, rather than the content and viewpoint of the speech. The evidence is that the defendants could have reasonably believed, and did believe, that they were not violating the plaintiff's free speech and religion rights

when they took action to stop the demonstration. In the context of a summary judgment motion, the court must consider the substantive evidentiary burden of preponderance of the evidence. *Anderson*, 477 U.S. at 2554; *T.W. Elec. Service Inc.*, 809 F.2d at 630. When the record is taken as a whole, a rational trier of fact, applying the preponderance of the evidence standard, would not find for the plaintiff. *Matsushita*, 475 U.S. at 586. The defendants' motion on these issues should be granted and the plaintiff's free speech and free exercise of religion [claims] should be dismissed on the grounds of qualified immunity.

D. False Arrest.

Probable cause to arrest exists when "the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime." *MacKinney v. Nielsen*, 69 F.3d 1002, 1003 (9th Cir. 1995) (citations omitted). The test for probable cause is whether the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe a suspect has committed, is committing, or is about to commit a crime. *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989). The experience and expertise of the officers involved in the investigation and arrest may be considered in determining probable cause. The arresting officer need not have personal knowledge of all facts sufficient to constitute probable cause. Probable cause may be based on the collective knowledge of all of the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom. *Id.*

Defendants Hornberg and McClusky contend that they had ample probable cause to arrest the plaintiff for failure to disperse and criminal trespass. (A custodial search led to the charge of possession of a controlled substance.) The plaintiff argues that the arrest was again an action to stop his exercise of his constitutional civil rights, and that there are numerous issues of fact regarding probable cause to arrest.

The law forbidding false arrest was clearly established at the time of the incident giving rise to this lawsuit. The charge of failure to disperse requires evidence of a group of three or more persons, actions which create a substantial risk of injury to any person, and a refusal to disperse when ordered to do so by a peace officer. RCW 9A.84.020. The charge of criminal trespass requires evidence that a person "knowingly enters or remains unlawfully in or upon premises of another. RCW 9A.52.080. WAC 132C-120-050 gives a designee of a college president or dean the authority to order persons, who threat [sic] or disrupt the ingress and/or egress of persons at the college, to vacate the college premises. WAC 132C-120-055 also gives the college designee the authority to call civil authorities if a person refuses to cease and desist from violating college or civil regulations.

Here, there is substantial evidence that Officers Hornberg and McClusky had probable cause to believe that the plaintiff had violated both of these offenses, and that arrest was appropriate. There is no evidence to support the plaintiff's contention that the arrest was solely for the purpose of stopping the plaintiff's exercise of his civil rights. Further, there is substantial evidence to support Defendants Wallace and Barclay's actions in

demanding that the plaintiff stop his demonstration and to [sic] leave the college facility. The defendants' motion on this issue should be granted, and the plaintiff's false arrest claim under 42 U.S.C. § 1983 should be dismissed on the ground of qualified immunity.

2) Whether Defendants Barclay, Wallace, Hornberg, McClusky, and City of Bremerton are liable for an alleged conspiracy to violate the plaintiff's civil rights.

42 U.S.C. § 1985(3) states, in pertinent part, that

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Here, the plaintiff claims that the defendants conspired together to violate his civil rights, including his freedom of speech, free exercise of religion, equal protection of laws, and freedom for [sic] illegal seizure. The court has determined that the defendants are entitled to qualified immunity from suit for those allegation [sic] of civil rights violations, and therefore, the conspiracy claim should be dismissed. *See Cassettari v. Nevada County,* 824

F.2d 735, 739 (9th Cir. 1987) (holding that when the conspiracy claim is based solely upon allegations which are determined to be insufficient to support a § 1983 claim, the conspiracy claim is precluded); *Dooley v. Reiss*, 736 F.2d 1392, 1395 (9th Cir. 1984) (holding that the absence of a § 1983 deprivation implies failure to state conspiracy claim). For this reason and the reasons stated by the defendants, the defendants' motion for summary judgment on this issue should be granted, and the plaintiff's claim of conspiracy pursuant to 42 U.S.C. § 1985(3) should be *dismissed*.

3) Whether the plaintiff has stated sufficient facts to prov that the City of Bremerton failed to adequately supervise and/ or train the defendant officers, or that the City of Bremerton maintained policies or customs that allowed civil rights violations.

This issue is moot since the court has concluded that the defendant police officers are protected by qualified immunity for the alleged civil rights violations. Further, the plaintiff has not presented any evidence that the police officers were inadequately supervised or trained, and that the City of Bremerton has any policies or customs allowing the violation of individual's constitutional civil rights.

B. State Law Claims.

4) Whether the plaintiff has stated sufficient facts to prove the tort of false arrest.

An action for false arrest

> is the unlawful violation of a person's right of personal liberty or the restraint of that person

> without legal authority: A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

Bender v. City of Seattle, 99 Wash. 2d 582, 591 (1983) (citations omitted). The arresting officer can establish a defense to a false arrest action by proving the existence of probable cause to arrest under the circumstances. *Id.* at 592.

Here, the court has determined that the defendants had probable cause to arrest the plaintiff, so his tort claim of false arrest fails. The defendants' motion for summary judgment on this claim should be granted, and the plaintiff's state law claim for false arrest should be dismissed.

5) Whether the plaintiff has presented sufficient factual issues for the tort of negligent infliction of emotional distress.

To prove the tort of negligent infliction of emotional distress, the plaintiff must show that the defendants' negligent actions injured him emotionally, and show objective symptoms of emotional distress. *Snyder v. Medical Serv. Corp. of Eastern Wash.*, 98 Wash. App. 315, 988 P.2d 1023, 1028 (1999). "Like all negligence claims, [a] negligent infliction of emotional distress claim requires duty, breach, proximate cause, and injury. A defendant's liability is measured "by the strictures imposed by negligence theory, i.e., foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger." *Id.* (internal quotations and citations omitted).

Here, the plaintiff does not present any evidence to meet the four elements of a negligence claim, and also does not present any evidence of objective symptoms of emotional distress. The defendants' motion for summary judgment on this claim should be granted, and the plaintiff's state law claim for negligent infliction of emotional distress should be dismissed.

6) Whether the plaintiff has presented sufficient factual issues for the tort of intentional infliction of emotional distress (outrage).

The tort of outrage, also known as intentional infliction of emotional distress, requires the plaintiff to prove "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Snyder,* 988 P.2d at 1027 (internal quotations and citations omitted). "The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (internal quotations and citations omitted). This tort requires much more than "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* (internal quotations and citations omitted).

The plaintiff simply does not present evidence to meet the elements of this tort. Further, the conduct which the plaintiff alleges was outrageous does not meet the standard set forth in the case law. The defendants' motion for summary judgment on this claim should be granted, and the plaintiff's state law claim for intentional infliction of emotional distress (outrage) should be dismissed.

Therefore, it is hereby

ORDERED that the Motion for Summary Judgment by Defendants Richard Barclay and Robert (Rocky) Wallace (Dkt. #22) is **GRANTED.** It is further

ORDERED that the Motion for Summary Judgment by Defendants Alan Hornberg, Rick McClusky, and the City of Bremerton (Dkt. #24) is **GRANTED IN PART.** All of the plaintiff's claims against all of the defendants are **DISMISSED.**

The Clerk of the court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 21 day of January, 2000.

/s/ Robert J. Bryan
Robert J. Bryan
United States
District Judge

United States District Court

WESTERN DISTRICT OF WASHINGTON

BENJAMIN ORIN	JUDGMENT IN A CIVIL CASE
v.	(Filed Jan. 24, 2000)
RICHARD BARCLAY	CASE NUMBER: C99-5125RJB

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Motion For Summary Judgment by Defendant's Richard Barclay and Robert (Rocky) Wallace (Dkt #22) is **GRANTED**.

It is further

ORDERED that the Motion for Summary Judgment by Defendants John Homberg, Rick McClusky, and the City of Bremerton (Dkt #24) is GRANTED IN PART. All of the plaintiff's claims against all of the defendants are DISMISSED.

January 24, 2000 — BRUCE RIFKIN
Clerk

/s/ Jean Boring
By Jean Boring,
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN K. ORIN, Plaintiff-Appellant, v. RICHARD BARCLAY, and his marital community, in his individual and official capacity; ROBERT WALLACE, and his marital community, in his individual capacity; ALAN HORNBERG, and his marital community, in his individual capacity; RICK MCCLUSKY, and his marital community, in his individual capacity; CITY OF BREMERTON, a municipal corporation, Defendants-Appellees.	No. 00-35177 D.C. No. CV-99-05125-RJB **ORDER** (Filed Dec. 27, 2001)

Before: BOOCHEVER, TASHIMA, and TALLMAN, Circuit Judges.

Judges Tashima and Tallman vote, and Judge Boochever recommends, to deny the petitions for rehearing en banc filed by plaintiff-appellant, Benjamin K. Orin and defendants-appellees, Richard Barclay and Robert Wallace.

The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED.

Full Text of Relevant Federal and State Statutes

42 U.S.C. § 1983 (2001)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C. § 1985(3) (2001)

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any

State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Wash. Rev. Code § 9A.52.070 (2001) ("Criminal trespass in the first degree")

(1) A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.

(2) Criminal trespass in the first degree is a gross misdemeanor.

Wash. Rev. Code § 9A.52.080 (2001) ("Criminal trespass in the second degree")

(1) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

(2) Criminal trespass in the second degree is a misdemeanor.

Wash. Rev. Code § 9A.52.090 (2001) ("Criminal trespass – Defenses")

In any prosecution under RCW 9A.52.070 and 9A.52.080, it is a defense that:

(1) A building involved in an offense under RCW 9A.52.070 was abandoned; or

(2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(3) The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain; or

(4) The actor was attempting to serve legal process which includes any document required or allowed to be served upon persons or property, by any statute, rule, ordinance, regulation, or court order, excluding delivery by the mails of the United States. This defense applies only if

the actor did not enter into a private residence or other building not open to the public and the entry onto the premises was reasonable and necessary for service of the legal process.

Wash. Rev. Code § 9A.84.020 (2001) ("Failure to disperse")

(1) A person is guilty of failure to disperse if:

(a) He congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

(2) Failure to disperse is a misdemeanor.

FILED
MAY 31 2002
OFFICE OF THE CLERK

No. 01-1440

In the

Supreme Court of the United States

BENJAMIN K. ORIN,

Petitioner,

versus

RICHARD BARCLAY, and his marital community in his individual and official capacity; ROBERT WALLACE, and his marital community, in his individual capacity; ALAN HORNBERG, and his marital community, in his individual capacity; RICK MCCLUSKY, and his marital community, in his individual capacity; CITY OF BREMERTON, a municipal corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pgs

QUESTIONS PRESENTED

1. Whether the District Court and Ninth Circuit properly granted Respondents Officer Hornberg and Officer McCluskey qualified immunity?

2. Whether this Court should decline to consider Petitioner's arguments concerning the alleged inconsistent decision of the Ninth Circuit with decisions of Sister Circuit Courts and the United States Supreme Court?

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STATEMENT OF THE CASE

Mr. Orin ("petitioner") is a member of the group Positively Pro-Life that regularly participate in demonstrations against abortion at colleges and high-schools. (Excerpts of Record (ER) 60-61, 101; City Supplemental Excerpts of Record (CSER) 39-47). When appearing at schools, the group carry 4 by 5 very graphic and disturbing pictures of damaged, aborted fetuses. (ER, 99; CSER 25-26). One picture shows a severed fetus head held in tongs over a petri dish. A second is of a whole fetus dismembered into numerous pieces. Once at the schools, the group use a method of demonstrating which entails contacting the dean or principal, announcing their intention to demonstrate, and proceeding to an area of the school where the most students will view their signs. (ER 63-65). The signs and demonstration methods invoke strong reactions from the students. Petitioner and his group have been arrested, assaulted, threatened with shootings, punched, grabbed, knocked down, had the signs hit with automobiles, and had the signs torn apart in reaction to the signs and demonstration methods. (ER 78; CSER 53-55). Almost every time the group has appeared at a school, the police have been called to investigate the "disturbance." (ER 62, 77).

On October 30, 1997, petitioner and two other members of the Positively Pro-Life organization arrived unannounced at Olympic Community College ("OCC") to inform the administration that they were going to engage in a demonstration on campus. (ER 100-101; CSER 50). None of the petitioner s group was a student at the school. (ER 84-85). Despite not having advanced permission through the college s permitting process, petitioner was allowed to demonstrate in front of the Bremer Student Center. The OCC campus is small and densely built. The only open space on campus is located in front of the Bremer Student Center, a space which abuts many classroom buildings and which virtually all students would be required to pass through between classes or in order to have lunch. (Appendix A to Barclay s Petition for Rehearing En Banc). The college

administration informed petitioner s group that they could protest provided they did not cause a breach of the peace, not interfere with students access to class, and that they did not engage in religious worship or instruction. (ER 66, CSER 21-24). In anticipation of student response, two campus security guards were assigned to stay with the demonstrators for their protection. (CSER 12, 16).

Within minutes of beginning the demonstration, the college dean s office began receiving complaints about the protesters demonstration methods and their posters. (CSER 23). Nevertheless, the protest was allowed to take place for more than four contentious hours. Despite petitioner s claims that none of the petitioner s group acted "violently," numerous facts demonstrate that the actions of the group incited the student crowd, in addition to the inflammatory posters. A member of petitioner s group admitted to jumping up on tables and speaking at a level loud enough to be heard over the shouting student crowd. (ER 104-05). The same individual admitted to striking a campus security guard which incited the crowd, although he denied the act was intentional. (ER 105; CSER 12, 14, 18, 20). Further, numerous students and security guards submitted evidence of racial and sexist epithets being used by the petitioner s group. (CSER 2, 5, 8, 10, 12, 14, 17, 20). The petitioner denies this yet admits that a member of his group incited a black student to react violently when the student was called a "Jamaica Man." (ER 108, 116; CSER 17, 56-57). Petitioner admits that numerous students throughout the demonstration had to be physically restrained from attacking the group. (CSER 45, 79-81). These actions could be heard from inside campus buildings, with doors closed, from 30 to 40 feet away. (ER 81-82; CSER 5). At least one class was cancelled early due to noise created by the demonstration. (CSER 34).

Toward the end of the four hours on campus, the crowd of approximately 40 to 50 students became more aggressive, began yelling and shouting threats of violence, and began pushing the campus security guards attempting to get at the protesters. (CSER 12, 14, 18, 20). The security

guards determined that potential violence was imminent and that they could no longer protect the safety of the protesters or the students. As a result, campus security asked the protesters to leave campus for violating conditions placed on them by the college. (CSER 12, 14, 18, 20, 51-52). The petitioner and his group refused to leave. (CSER 13, 14, 18, 20). Campus security contacted the City of Bremerton police for assistance and informed them that the situation was becoming physical and to expedite their response. (ER 55-56). Officer Hornberg, who was the first officer to receive the call, was informed by police dispatch to respond to the scene of a reported group of protesters that were refusing to leave and a large unruly crowd that was getting out of hand. Upon Officer Hornberg s arrival, he was met by campus security at the edge of campus and informed that the protesters had violated conditions placed on them by the campus, that the student crowd was agitated to the point of physical violence against the protesters, and that the security staff had insufficient manpower to protect the protesters from the students. Hornberg was further informed that a member of the petitioner s group had hit a security guard, knocking his hat off his head, and that the petitioner s group had been asked to leave for violating the conditions of their stay on campus but refused. (ER 41, 52). At no time was Officer Hornberg informed of the substance of the specific conditions placed on the petitioner by the college. Petitioner presented no evidence demonstrating that the officers had any connection with the establishment of college policies pertaining to demonstrations, or that they were enforcing college guidelines. (Petition for Writ of Certiorari, Appendix p. 16, 32, 34-35).

Upon arriving at the quad, Officer Hornberg observed the large student crowd encircling the petitioner s group angrily shouting and threatening to commit violent acts against the group. (ER 41). The petitioner described the crowd at the time Officer Hornberg arrived as a "clearly and openly hostile opposing mob." (CSER 27). Officer Hornberg asked the petitioner to leave campus several more times and he again refused. The petitioner was then arrested for

trespassing and failure to disperse. (ER 95-96, 106-107). Officer McCluskey arrived after the petitioner was under arrest and was informed by Officer Hornberg of the reasons for the arrest. Officer McCluskey s only involvement was to inform Officer Hornberg to transport the petitioner to the jail for booking. (Petition for Writ of Ceriorari, Appendix p. 13).

Petitioner sued respondents Officer Hornberg, Officer McCluskey and the City of Bremerton. Petitioner asserted claims under 42 U.S.C. § 1983 and 1985(3) for violation of the Equal Protection Clause under the Fourteenth Amendment, and Freedom of Speech and Free Exercise of Religion under the First Amendment. Despite petitioner s claims in his petition before this Court, the Ninth Circuit recognized that no claim was made for violation of petitioner s Fourth Amendment rights in his complaint. (Petition for Writ of Certiorari, Questions Presented for Review; Appendix, p. 6). Instead, petitioner alleged pendent state tort claims, including a common law claim for false arrest. The District Court granted respondents summary judgment based on qualified immunity and the Ninth Circuit affirmed. Petitioner seeks review in this court of the summary judgment granted to the police officers, but seeks no review of the summary judgment granted to the City of Bremerton.

REASONS FOR DENYING THE PETITION

1. Public Schools Are Not Traditional Public Forums

A college or university differs in significant respects from public forums such as streets or parks. College and university facilities are not open to the public in the same way that streets and parks are in that university facilities—private and public—are maintained primarily for the benefit of the student body and the faculty. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981). A university s mission is education, and decisions of this Court have never denied a university s

authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. *Id.* at 268; *Greer v. Spock*, 424 U.S. 828, 836 (1976) (rejecting the suggestion that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum for purposes of the First Amendment). Where state-operated educational institutions are involved, this Court has long recognized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *Healy v. James*, 408 U.S. 169, 180 (1972).

> "We...hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct."

Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969), cited with approval in *Healy v. James*, 408 U.S. 169.

In the context of the special characteristics of the school environment, the power of the government to prohibit lawless action is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 513 (1969). Activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. *Healy v. James*, 408 U.S. at 189. Thus, conduct in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional

guarantees of freedom of speech. *Cf. Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966). Noisy demonstrations that disrupt or are incompatible with normal school activities may be prohibited. Such expressive conduct may be constitutionally protected at other places or times, but next to a school, while classes are in session, it may be prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 120 (1972).

Here, OCC placed conditions upon the petitioner s group, including that they not cause a breach of the peace during their presence on campus. The evidence presented demonstrated that petitioner s group caused a significant disturbance that physically endangered themselves, students and school property, precipitated cancellation of class, and substantially interfered with students ability to obtain the education for which they had paid. These actions in violation of the college s conditions, forced the college to revoke petitioner s license to remain on campus and when he refused to leave, compelled the college s request for police assistance.

2. Officers Hornberg and McCluskey had Probable Cause to Arrest Petitioner and Were Properly Granted Qualified Immunity

Officer Hornberg and Officer McCluskey had no involvement in the placement of any conditions upon the petitioner s stay on campus, no knowledge of the substance of the conditions, or involvement in the revocation of petitioner s license to remain on campus by the college. Officer Hornberg s and Officer McCluskey s only involvement was to respond to the college s request for assistance, obtain information regarding the situation, and independently corroborate that information. The only action taken by the police officers against the petitioner was to enforce the

criminal trespass[1] and failure to disperse[2] statutes in reliance on information obtained. Thus, the only legitimate dispute is whether the respondent police officers possessed probable cause and/or are entitled to qualified immunity for the arrest of the petitioner based on information in their possession.

Probable cause exists when the facts and circumstances within the arresting officer s knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime. *MacKinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995). Further, an informant s description of illegal activity is sufficient to establish probable cause if the totality of the circumstances indicate that the tip is reliable. *United States v. Elliott*, 893 F.2d 220, 223 (9th Cir. 1990). Thus, when an officer has received information from some person—normally the putative victim or any eyewitness—who it seems reasonable to believe is telling the truth, he has probable cause to arrest the accused perpetrator. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 439 (7th Cir. 1986). The arresting officer need not have personal knowledge of all facts sufficient to constitute probable cause. Probable cause may be based on the collective knowledge of all of the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom. *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989).

Further, officers are entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If an officer could reasonably have believed that his actions

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[1] RCW § 9A.52.080 requires evidence that a person "knowingly enters or remains unlawfully in or upon premises of another.

[2] RCW § 9A.84.020 requires evidence of a group of three or more persons, actions which create a substantial risk of injury to any person or property, and a refusal to disperse when ordered to do so by a peace officer.

were legal in light of clearly established law and the information he possessed at the time, then his conduct falls within the protective sanctuary of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). A qualified immunity analysis begins with the threshold question: based upon the facts taken in the light most favorable to the party asserting the injury, did the officer s conduct violate a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right was violated, no further inquiry is required. If however, a constitutional violation occurred, the second inquiry is whether the officer could nevertheless have reasonably but mistakenly believed that his conduct did not violate a clearly established constitutional right. *Id.* at 201.

In this case, police dispatch informed Officer Hornberg that a group of protesters was inciting a large, unruly crowd. Upon his arrival, Officer Hornberg was informed by a campus security officer that the petitioner s group had violated the conditions of their license to remain on campus, were creating an unsafe, potentially riotous situation, and were refusing to leave despite orders to leave from campus security. Even though corroboration was unnecessary for the purpose of establishing probable cause, Officer Hornberg confirmed these reports through his personal observations of the demonstration when he arrived at the scene. Officer Hornberg repeatedly asked the petitioner to leave campus and when he refused, he was properly arrested for trespass and failure to disperse.

This case is factually and legally similar to *Kelley v. Myler*, 149 F.3d 641 (7th Cir. 1988). In *Kelley*, the plaintiff was protesting on what was thought to be private property. *Id.* at 644. The property owner asked the plaintiff to leave and when she refused, the property owner called the police. Upon their arrival, the police were informed of the situation by the property owner. The police subsequently asked the plaintiff to leave and she refused, claiming she was on public property. When she refused to leave, she was arrested for trespassing. The property later turned out to be public

property and the charges were dismissed. *Id.* at 644. Plaintiff filed a § 1983 action against the officers alleging lack of probable cause for the arrest. The trial court and the Seventh Circuit found the officers entitled to qualified immunity because the facts and circumstances within the officer's knowledge were sufficient to justify their belief that the plaintiff had committed, or was committing, the offense of trespass. The plaintiff contended the officers should not have made the arrest without checking records for property boundaries. However, the court refused to add this additional requirement to the probable cause determination because the inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation. *Id* at 646.[3]

No mandate in the Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people for public buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals. *Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969). Here, the undisputed evidence confirms that Officer Hornberg and Officer McCluskey reasonably believed that they were not violating the petitioner's First Amendment rights because they had probable cause to arrest for criminal trespass and failure to disperse. Even if the officers were mistaken and probable cause was not present, their mistake was reasonable and the officers were properly granted qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001).

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[3] *See also Bodzin v. City of Dallas*, 768 F.2d 722 (5th Cir. 1985).

3. The Ninth Circuit Decision Does Not Conflict with Other Circuit Court Decisions or United States Supreme Court Decisions Regarding the Response of Police Officers to Hostile Situations on Public School Grounds

A. Circuit Court Decisions

Because Officer Hornberg and Officer McCluskey possessed probable cause for the petitioner s arrest and are entitled to qualified immunity, petitioner cannot make a valid claim against the officers for violating his free speech rights. As this Court has stated, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. Louisiana*, 379 U.S. 536, 555, (1965). Nevertheless, petitioner asserts that this Court should accept review because the Ninth Circuit decision conflicts with decisions from the Fifth, Sixth, and Eleventh Circuits with regard to an officer s duty to first attempt to disperse a hostile crowd before effectuating the arrest of the demonstrator causing the mob reaction. Petitioner s assertion is without merit as the Ninth Circuit is **consistent** with the above circuit court decisions regarding free speech in traditional public forums:

> [t]he courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1997), citing with approval *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

However, important factors distinguish the current case from the Fifth, Sixth and Eleventh Circuit decisions

cited by petitioner and the Ninth Circuit s decision in *Collins v. Jordan*, supra. First, Officers Hornberg and McCluskey possessed probable cause to arrest the petitioner for violation of two neutral and narrowly tailored criminal statutes that punished actionable conduct, not the content of speech. Second, petitioner s demonstration and arrest occurred on a public school campus where this Court has repeatedly acknowledged the right and responsibility of public schools to protect their students, facilities, and educational purpose through reasonable regulations. In fact, the Fifth, Sixth, and Eleventh Circuits are **consistent** with the Ninth Circuit decision in this case regarding First Amendment rights and the necessity for reasonable rules allowing a school to advance its educational missions. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (a school need not tolerate speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966) (it is within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine); *Bright v. Nunn*, 448 F.2d 245, 249 (6th Cir. 1971) (school officials have the right to prescribe and control conduct in the schools and must be given wide authority in maintaining discipline and good order on campus); *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438, 442 (5th Cir. 1973) (First Amendment does not give students the right to disrupt openly the educational process in order to press their grievances).[4]

The District Court and Ninth Circuit properly found probable cause for the petitioner s arrest and granted the police officers qualified immunity. Petitioner has failed to present any conflicting authorities within the context of the

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[4] Thus, the Ninth Circuit in this case was correct when it found the school s "no breach of the peace" condition neutral and consistent with the pedagogical purpose of the educational facility.

facts of this case, and this Court should decline review of this case as no true conflict among the circuit courts exists.

B. United States Supreme Court Decisions

The petitioner asserts that the Ninth Circuit decision in this case is inconsistent with decisions of this Court regarding an officer s duties when responding to a hostile crowd. *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Gregory v. Chicago*, 394 U.S. 111 (1969). The petitioner s claims are without merit. The *Terminiello* and *Gregory* cases disallowed criminal convictions based on overbroad statutes that intruded on protected free speech rights. Neither case addresses whether an officer is entitled to qualified immunity for a proper arrest pursuant to a criminal statute, and neither addresses free speech issues in a public school setting.

Here, probable cause existed for the petitioner s arrest. The criminal trespass and failure to disperse statutes allow ample room for free speech activities yet criminalize conduct the state is authorized to prevent. . The petitioner never challenged the facial validity of either criminal statute for vagueness, indefiniteness, uncertainty, or that the language of the statutes allowed an arrest for protected free speech activities. *See State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971) (holding the statutory predecessor to Washington s failure to disperse statute constitutional and not violative of First Amendment free speech rights). Rather, petitioner has simply argued that because the campus was public, his speech was protected, and as a result, his arrest was "unconstitutional" because the officers did not first attempt to take action against the hostile student crowd prior to his arrest.

Petitioner s claims are based on the misguided notion that because the college was "public", his actions are constitutionally immunized. This Court has rejected the suggestion that when a public building is made available to the public, it becomes a public forum for the purposes of the

First Amendment. *Greer v. Spock*, 424 U.S. 828, 836 (1976). For example, in *Adderley v. Florida*, 385 U.S. 39 (1966), a demonstration held on the grounds of a local jail to protest the arrest of fellow demonstrators the preceding day where the demonstrators refused to leave the grounds, was held criminally actionable under a *trespass* law. Answering the defendants contention in that case that their presence at the jail site was in a constitutionally protected exercise of freedom of speech and peaceable assembly, this Court declared:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners argument that they had a constitutional right to stay on the property, over the jail custodian s objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable but also particularly appropriate..." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox v. Louisiana*, *supra*, at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

Adderley v. Florida, 385 U.S. at 47.

Justice Roberts language in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) cited, approved and affirmed in *Ashton v.*

Kentucky, 384 U.S. 195, 199 (1966), applies with equal force to unlawful assembly and breach of the peace:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. *When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.*

Cantwell v. Connecticut, 310 U.S. at 308. (emphasis added).

Petitioner was granted a conditional license to protest on school campus provided his group complied with the college s conditions, including a "no breach of the peace" condition. Petitioner s conduct unquestionably caused a substantial breach of the peace endangering persons, property, and interfering with the pedagogical operations of the college. Both the campus security and police officers reasonably concluded that a substantial risk of violence was imminent. Petitioner was informed that his right to remain on the school campus was revoked and that he was to leave. When petitioner refused to comply with the demands, he was properly arrested for trespassing and failure to disperse. Petitioner has cited no authority from this Court in support of an alleged conflict with the Ninth Circuit s decision in the context of the public school circumstances present here. As such, this Court should deny the petition for review.

4. The Ninth Circuit Decision Does Not Conflict with the United States Supreme Court or the D.C. Circuit Court Regarding the Proper Degree of Scrutiny

Petitioner argues that his arrest was a content-based regulation on his right to conduct free-speech activities on the OCC campus and that the Ninth Circuit failed to address this issue. The cases cited in support of this proposition are inapposite as they simply stand for the principle that a regulation ("ordinance" or "permit"), that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Christian Knights of Ku Klux Klan Invisible Empire Inc. v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992).

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government s purpose is the controlling consideration. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989). Here, the police officers had no involvement with the placement of any time, place, or manner "regulation" on the petitioner s group as the conditions were placed on them by the college. The petitioner was arrested based on his conduct, not the content of his speech. The police officers were unaware of the specific conditions placed on the petitioner by the college. Petitioner presented no evidence demonstrating that the content of petitioner s speech had any bearing on Officer Hornberg s decision to place him under arrest, or that the officers chose to arrest him over the students because they disliked the content of his speech. In making the arrest, the officers were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and there was no evidence which could demonstrate that the acts of the police officers were a cover for suppression of petitioner s views and

opinions. *Feiner v. New York*, 340 U.S. 315, 319 (1951). Petitioner has failed to support this argument factually or demonstrate that a conflict of legal authorities exists justifying this Court s review.

Petitioner further asserts that the college s "no-disturbance" regulation is facially unconstitutional because it sweeps within its broad scope, activities that are constitutionally protected free speech and assembly, in contradiction to this Court s decision in *Cox v. Louisiana*, 379 U.S. 536 (1965). Petitioner thus appears to argue that because the terms of the college s "no-disturbance" condition were not more clearly defined, the condition is unconstitutional. Once again, these claims are without merit as to the respondent police officers. The police had no involvement with placing any conditions upon the petitioner s stay on campus. The police were not aware of the specifics of the conditions at the time of the arrest and were thus not specifically enforcing any of the conditions. If petitioner takes issue with the terms of the conditions placed on his group by the college, that is a proper issue with the college.[5] Petitioner has failed to present any conflicting authority demonstrating that the officers should be held responsible for the substance of any constitutional or unconstitutional conditions placed on petitioner by the college. This Court should deny the petitioner s request for review.

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[5] Courts have held that school disciplinary codes are not held to the same precision as criminal codes and that some degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned. *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438, 442 (5th Cir. 1973); *Burnside v. Byars*, 363 F.2d 744, 748, (5th Cir. 1966); *Grayned v. City of Rockford*, 408 U.S. 104, 110-111 (1972).

5. The Ninth Circuit's Decision Does Not Conflict with United States Supreme Court Decisions Regarding Officers' Standards for Preventing Imminent Lawless Action

Petitioner asserts that the decision of the Ninth Circuit is in conflict with this Court s decisions regarding whether an officer must establish evidence that the protestor *intentionally* incited imminent lawless action by the audience prior to effectuating an arrest. He asserts that the District Court and Ninth Circuit failed to apply this standard and determine whether the incitement of the student group was an intentional result of his speech.

Petitioner s assertion is without merit. From the information presented to Officer Hornberg and Officer McCluskey, they reasonably concluded that petitioner had been asked to leave campus for violating conditions of his stay and he was thus criminally trespassing when he refused to leave, irregardless of whether or not petitioner "intentionally" incited the student crowd. Further, the officers reasonably concluded that petitioner s actions in a group of 40-50 individuals had intentionally incited the group and that a substantial risk of injury to persons or property existed. When petitioner refused to obey Officer Hornberg s orders to leave campus, he was properly arrested for failure to disperse.

If petitioner s argument is that officers must first have specific evidence of intent to incite violence prior to an arrest, no arrest will survive scrutiny in a free speech context as rarely will a speaker directly urge a crowd to act or react violently. Nor will a speaker likely admit to having such an intent if violence does result from free speech activities. Therefore, an effective and safe way for the petitioner to circumvent the "intent" element would be to incite mob action while pretending to condemn it. This is precisely the case here where any claim by petitioner that he did not intend to incite the students is disingenuously hollow in light of the lengthy and consistent history of violence and police

involvement that accompany his demonstrations. In such a circumstance, no arrest could be justified absent a rare admission of intent. Thus, the true judgment of intent is aided by observation of the petitioner, as was possible for the security guards and police officers.

In performing their jobs, police officers are asked to make split second judgments. As a result, courts are cautious not to "second guess" police officers who are required to assess a potentially dangerous situation and respond to it without studied reflection. *Glasson v. City of Louisville*, 518 F.2d 899, 910 (6th Cir. 1975). Qualified immunity embodies this principle and recognizes that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here false arrest/freedom of speech, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular arrest is legal in those circumstances. If the officer s mistake as to what the law requires is reasonable, the officer is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. at 205.

Here, Officer Hornberg and Officer McCluskey received information regarding petitioner s violation of college guidelines and reports of escalating violence. These reports were corroborated by Officer Hornberg s independent observations. The petitioner was arrested because probable cause existed for his arrest. However, even if the officers were mistaken as to what the law requires under the exigent circumstances they faced, the mistake was reasonable and qualified immunity was properly granted.

CONCLUSION

Petitioner has failed to identify any authority demonstrating a clearly established rule prohibiting Officer Hornberg and Officer McCluskey from placing him under arrest under the circumstances they faced. Further, petitioner has failed to present cases demonstrating that the

Ninth Circuit s decision here conflicts with authorities from the Circuit Courts or the United States Supreme Court. As such, the Petition for Writ of Certiorari should be denied.

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No. 01-1440

Supreme Court, U.S.
FILED
JUN 14 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BENJAMIN K. ORIN,

Petitioner,

v.

RICHARD BARCLAY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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12 pp

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REASONS TO GRANT THE PETITION

A. All Facts Must Be Construed in Favor of Petitioner Orin.

Throughout their opposition brief, respondents Alan Hornberg and Rick McCluskey attempt to strengthen their arguments by perverting the factual context in which this case arose. The district court granted summary judgment against petitioner Benjamin Orin on all claims. Petition for Writ of Certiorari ("Pet.") at App. 42-43. Therefore, there should be no factual issues at this juncture, for all facts must be construed in Orin's favor. Hornberg and McCluskey fail to grant this deference when making numerous hotly disputed allegations that Orin or his two friends acted violently, had a history of inciting violence, and incited the crowd with racial or sexist epithets. This Court should not be distracted by these disputed facts. The Court need not resolve any factual disputes in order to consider the Questions Presented.

B. The College Officials and the Ninth Circuit Treated the Student Center Area as a Public Forum.

Hornberg and McCluskey place unfounded reliance on the principle that a public college campus is not necessarily a public forum. For, as here, a public college can create a public forum on all or part of its campus when it allows public speakers. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995); *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981). It is undisputed that the college officials, respondents Richard Barclay and Robert Wallace, allowed petitioner Orin on campus and directed him to the student center area for the

purpose of demonstrating. Pet. at App. 3, 10; Brief in Opposition to Petition for Writ of Certiorari ("Opp'n") at 1 ("petitioner was allowed to demonstrate in front of the Bremer Student Center"). Thus, at the least, the college officials made the area a public forum for purposes of Orin's expression and the hostile crowd's opposition to Orin. At no point in this litigation has any defendant-respondent argued that the student center area was not a public forum. Nor has anyone argued that the police officers believed that the student center area was not a public forum. The Ninth Circuit treated the area as a public forum. Pet. at App. 10-11; *see* Pet. at 20 n.6. The Questions Presented in Orin's petition are properly set in the context of the arrest of a speaker in a public forum on a public college campus.

C. There Can Be No Probable Cause to Arrest for Actions that the First Amendment Protects.

Hornberg's and McCluskey's arguments only serve to manifest the reasons why this Court should review this case. Officers Hornberg and McCluskey believe they can arrest a speaker in a public forum because a crowd gathers and grows increasingly hostile to the speech. Yet they fail to engage the critical question about probable cause that Orin raised in his petition. Their arguments pertain to whether the officers reasonably believed that the Washington criminal trespass and failure to disperse statutes prohibited Orin's activities.

But Orin's point is this: Inherent in determining probable cause in this context is determining whether the First Amendment protects the speech or conduct at issue. Before an officer, or a court, even considers whether a

demonstration in a public forum violates a state criminal statute, he must ask whether the Free Speech Clause protects the demonstration (or parts of it). The officer or court cannot simply assume that because a statute prohibits the activity, the First Amendment does not protect it.

In the context of a hostile audience, determining whether the First Amendment protects the speech or conduct primarily means assessing whether the speaker has intentionally incited imminent lawless action and is likely to succeed. *See infra*. Hornberg and McCluskey argue that officers can arrest, without *any* inquiry, a speaker in a public forum where the government officials claim the speakers "violated the conditions of their license to remain" in the forum. *See* Opp'n at 8.

But what if the terms or application of the "license" were unconstitutional? According to Hornberg and McCluskey, that question is immaterial, *see* Opp'n at 6-9, 16; all the police need is information from government officials indicating that the speaker has broken the rules. Yet if that is the case, then government officials can engage in the most invidious of discriminatory acts and then call the police to enforce the discrimination. After arresting the speaker, the officers can claim immunity as long as they never knew (or bothered to ask) the reasons for the government's action. If this is not the law, then this Court should intervene lest this misconception prevail.

To the extent that the First Amendment protects, a state statute cannot prohibit. It follows that an officer's belief that he is not violating the First Amendment is not made reasonable by the fact that he has probable cause to

arrest for violation of a state statute.[1] Hornberg and McCluskey completely fail to address this point. *See* Opp'n at 6-9. They make no effort to show how the decision below does not conflict with this Court's decisions which demonstrate that speech or conduct protected by the First Amendment cannot be criminal. *See* Pet. at 22-23. Likewise, they fail to offer any reason as to why this Court should not stop the dangerous precedent below which tells officers that they need not consider a speaker's First Amendment rights if the officers reasonably believe that the speaker's expression violates a state statute.

D. The Decision Below Conflicts with Decisions Regarding Hostile Audiences.

1. Circuit court decisions.

Hornberg and McCluskey imply that the Ninth Circuit's decision in *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1997), somehow nullifies the conflict among the decision below and the hostile audience cases in the Fifth, Sixth, and Eleventh Circuits that Orin discusses in his petition. *See* Opp'n at 10. Yet *Collins*, which arose out of the Rodney King riots in Los Angeles, only demonstrates further conflict. Ironically, Hornberg and McCluskey quote a passage from *Collins* that supports Orin's position, not theirs. The passage is one in which the Ninth Circuit holds that police should arrest only those who are *actually*

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[1] Even putting the First Amendment aside, Orin does not concede that officers Hornberg and McCluskey had probable cause to arrest him. *See* Pet. at App. 18-21 (Boochever, J., concurring in decision below).

violent, not those (like Orin) who engage in protected speech. *See* 110 F.3d at 1372. Indeed, in his concurrence to the decision below, Judge Boochever quotes the same passage from *Collins* in explaining that there was no probable cause to arrest Orin. Pet. at App. 21-22. Orin cited *Collins* extensively to the Ninth Circuit, yet the majority opinion does not mention it. Absent this Court's intervention here, lower courts will likely view the decision below as controlling over *Collins* because the decision below is more recent.

Even if *Collins* were the Ninth Circuit's controlling decision in this area, it would not resolve the circuit court conflict regarding when it is appropriate to arrest a speaker based on the hostile reaction of the speaker's audience. *Collins* does not address this issue directly. To the extent that *Collins* requires "an adequate police presence" to protect First Amendment expression without exception, 110 F.3d at 1372, it conflicts with cases such as *Beckerman v. Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981), which allow arrest of a speaker if control of the hostile crowd becomes impossible.

Hornberg's and McCluskey's assertion that the decision below is distinguishable from the other circuit court decisions because Hornberg and McCluskey had probable cause based on "actionable conduct, not the content of the speech," Opp'n at 11, begs the question: Does the First Amendment protect the speech or conduct at issue? The courts in *Beckerman*, *Glasson v. Louisville*, 518 F.2d 899 (6th Cir. 1975), and *Sabel v. Stynchcombe*, 746 F.2d 728 (11th Cir. 1984), each had to address this question. As noted above, an officer or a court must consider this question before determining probable cause. *See Sabel*,

746 F.2d at 731 (holding that arrests for refusal to disperse violated First Amendment).

In addition, even if Hornberg and McCluskey accurately assert that other Fifth, Sixth, and Eleventh Circuit cases recognize the right of public colleges to reasonably regulate their campuses, this does not obviate or address the conflict among *Beckerman*, *Glasson*, *Sabel*, and the decision below.

2. U.S. Supreme Court decisions.

Officers Hornberg and McCluskey fail to distinguish the present case from *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Gregory v. Chicago*, 394 U.S. 111 (1969). Both cases address free speech rights in a public setting. *See* 337 U.S. at 2-3; 394 U.S. at 111-12. Likewise, the fact that neither case addresses qualified immunity does not diminish the cases' importance in showing the constitutional response to a speaker opposed by a hostile audience.

Hornberg and McCluskey also miss the point about the Washington criminal statutes. Whether the challenge is labeled facial or as applied, throughout this litigation Orin has argued that the officers had no probable cause to arrest because the First Amendment protects the actions for which the officers arrested him.

Hornberg's and McCluskey's reliance on *Adderley v. Florida*, 385 U.S. 39 (1966), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), is misplaced. Although *Adderley* predated this Court's "public forum" line of cases, in *Adderley* the Court rested its holding in part on the fact that the government arrested the speakers when they refused to leave "jail grounds reserved for jail uses." 385

U.S. at 47. The government had not opened the forum for public use, as the college officials did in the present case. In *Cantwell*, this Court reversed the defendant's conviction for breach of the peace as unconstitutional. 310 U.S. at 307-11.

More important, *Adderley* and *Cantwell* are outdated to the extent that they bear on the government's response to inflammatory or inciting speech in a public forum. This Court made clear in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Texas v. Johnson*, 491 U.S. 397 (1989), that the government can prohibit provocative speech due to its likelihood to incite others only when "the expression 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *Johnson*, 491 U.S. at 409 (quoting *Brandenburg*, 395 U.S. at 447).

E. The Decision Below Conflicts with Cases Regarding the Proper Degree of Scrutiny.

Hornberg and McCluskey acknowledge that Orin's arrest was precipitated by the hostile reaction of the audience that opposed Orin. *See* Opp'n at 3 ¶ 2. Yet the officers fail to take issue with the decisions of this Court and the D.C. Circuit which hold that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *accord Christian Knights of the Klu Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 373-74 (D.C. Cir. 1992). Even if the officers were unaware of specific conditions that college officials Barclay and Wallace placed on Orin, officers Hornberg and McCluskey chose to arrest Orin based on the hostile reaction of the listeners. This was a content-based decision

that a court must review with strict scrutiny. *See* Pet. at 19-20. The Ninth Circuit failed to apply strict scrutiny and, thus, the decision below conflicts with decisions of this Court and the D.C. Circuit.

Orin also rejects the assertion of respondent college officials Barclay and Wallace that "they have no direct interest in the outcome of the petition." Letter from William B. Collins, Senior Assistant Attorney General, State of Washington, to William K. Suter, Clerk of the Court (May 31, 2002). The Ninth Circuit's holding that two of the conditions imposed by the college officials were constitutionally valid, content-neutral regulations favors Barclay and Wallace. Likewise, Orin was arrested as a result of actions taken by Barclay and Wallace. For these reasons, Barclay and Wallace have a direct interest in Orin's challenges to the Ninth Circuit's holding and to his arrest.

F. The Decision Below Conflicts with This Court's Decisions Regarding Preventing Imminent Lawless Action.

Officers Hornberg and McCluskey concede that they had no independent basis for arresting Orin. Rather they attempt to justify the arrest because the crowd was growing hostile. Astonishingly, Hornberg and McCluskey (like the Ninth Circuit) fail to even mention, much less apply, *Brandenburg* and *Johnson*, which set forth this Court's standard for constitutionally prohibiting speech that incites imminent lawless action: The expression must be directed to inciting or producing imminent lawless action and must be likely to incite or produce such action. *Johnson*, 491 U.S. at 409 (quoting *Brandenburg*, 395 U.S. at 447). Obviously, the officers know that this Court's

precedents do not support the "heckler's veto" that their actions in this matter have established.

It is unnecessary for this Court to decide how the intent element of the *Brandenburg* standard – that the expression be *directed* to inciting – must be proved. On the record below, at the summary judgment stage, there is absolutely no indication that Orin intended to incite violence or lawless action. Instead, this Court should review the decision below to reverse conflicting precedent in the nation's largest circuit that fails to apply the *Brandenburg* standard and, thus, gives license to unconstitutional suppression of speech.

CONCLUSION

In their opposition brief, respondents Alan Hornberg and Rick McCluskey repeatedly assert that petitioner Orin's arrest must have been constitutional because the officers allegedly had probable cause under state criminal statutes. Yet Hornberg and McCluskey fail to show that the First Amendment does not protect the activity for which Orin was arrested. More important, they fail to show how the decision below does not conflict in important ways with decisions of this Court and the circuit courts in regard to hostile audiences. For these reasons, and those

stated in Orin's petition for writ of certiorari, Orin respectfully asks the Court to grant the petition.

Respectfully submitted,

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